The Reporter
2019 Archive

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Civil Law: Civil law disciplines are interwoven with the acquisition, operation, protection, and preservation of the force and its people, funds, weapon systems, materiel, and installations.

HURRICANE MICHAEL

Posted: 23 October 2019

By Lieutenant Colonel Daniel J. Watson

Excerpt: A member of the weather flight mentioned they were "keeping an eye on something" in the Caribbean Sea, but there was definitely no sense of alarm in the briefer's demeanor…. We had no idea this would be our last day together as a group.

BEYOND SNOWDEN

Posted: 22 August 2019

By Lieutenant Colonel Aaron Jackson

Excerpt: Whistleblower cases provide a fascinating look into the inner workings of AF organization, leadership, and command. While this article cannot replace a full review of AFI 90-301 and the MWPA, it provides lawyers and JAGs with a quick primer on how to review and process these complex cases.

CULTURE WARS

Posted: 6 June 2019

By Mr. Thomas G. Becker, Col (Ret), USAF

Excerpt: Media accounts of the events surrounding Col Bohannon's decision not to sign the certificate of appreciation for his retiring noncommissioned officer's same-sex spouse aren't clear. After consulting several sources, this is my understanding of what happened.

MILITARY SEXUAL ASSAULT TESTIMONY

Posted: 28 March 2019

By Major Douglas E. DeVore II

Excerpt: The following describes a specific case where the federal officer removal statute was implicated through the creative use by civilian counsel. This article sets forth considerations that JAGs should consider when analyzing a case that implicates multiple jurisdictions.

UNDERSTANDING ENVIRONMENTAL REMEDIATION ON AN AIR FORCE INSTALLATION

Posted: 6 March 2019

By Major Michael Schrama

Excerpt: Air Force bases have rich histories that predate legislation describing how hazardous substances should be handled and disposed; and the military mission inherently involves various substances, solvents, fuels and munitions, that make their way into the subsurface and groundwater.

ADVISING THE UNDOCUMENTED MILITARY SPOUSE

Posted: 20 February 2019

By Captain Aaron R. Petty

Excerpt: Although both parole in place and DACA may offer the undocumented military spouse peace of mind, legal assistance attorneys should ensure clients fully understand the benefits and limitations of each type of relief, as well as the eligibility criteria for both.

NOTHING SAYS 'I LOVE YOU' LIKE A CONTRACT

Posted: 6 February 2019

By Captain Matthew H. Ormsbee

Excerpt: As legal assistance attorneys and paralegals, we draft our clients' requested estate planning documents, oversee document execution, and generally consider our work done. But it is also our job to ensure that clients' later efforts to use their estate documents are as painless as possible.

Leadership – Our mission readiness and success depend on leadership development across all domains, including knowledge management, professional development, training, planning and resourcing, and inspections.

THE CAPTAIN'S CHOICE

Posted: 19 December 2019

By Lieutenant Colonel Matthew E. Dunham

Excerpt: A leadership lesson in attitude. You can't always control what happens around you, or even to you, but in every situation you always have a choice to make.

A MOVEMENT FOR TEMPERANCE

Posted: 9 January 2019

By Lieutenant Colonel Benjamin F. Martin

Excerpt: This article first contemplates our responsibility to guide Airmen with lessons of temperance learned from life in the glass house and offers the philosophy of a "stoic" Prisoner of War (P.O.W.) in Vietnam.

Military Justice and Discipline – The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen national security.

AVOIDING VOIR DIRE PITFALLS

Posted: 5 December 2019

By Lieutenant Colonel Willie (Will) J. Babor

Excerpt: This article will provide guidance and some best practices you can employ when preparing for *voir dire* in the military courtroom.

ADMINISTRATIVE INVESTIGATIONS AND NON-JUDICIAL PUNISHMENT IN JOINT ENVIRONMENTS

Posted: 23 May 2019

By Captain Balaji L. Narain & Captain Dustin L. Banks

Excerpt: Intended to be an initial reference when conducting investigations or shepherding NJPs in a joint environment. By flagging the most salient distinctions between the services' rules, our goal is to help the JAG practitioner keep an eye out for potential pitfalls.

R.C.M. 905(E)'S NEW, INCOMPREHENSIBLE STANDARD

Posted: 9 May 2019

By Mr. James A. Young, Colonel (Ret), USAF

Excerpt: This article examines the historical context of R.C.M. 905, its newly enacted standard, and recommends changes to conform more closely to federal civilian practice.

WHY WE FIGHT

Posted: 25 April 2019

By Lieutenant Colonel Charles G. Warren

Excerpt: What good is being a subject matter expert in the administration of military justice if you cannot convince your colleagues, your commanders, and when it comes down to it, the court-martial members, that your application of the law is not only the correct one, but the just one.

MILITARY SEXUAL ASSAULT TESTIMONY

Posted: 28 March 2019

By Major Douglas E. DeVore II

Excerpt: The following describes a specific case where the federal officer removal statute was implicated through the creative use by civilian counsel. This article sets forth considerations that JAGs should consider when analyzing a case that implicates multiple jurisdictions.

HOW TO ACHIEVE SUCCESS IN FEDERAL MAGISTRATE COURT

Posted: 23 January 2019

By Captain David K. Rolek & Captain Gabriel W. Bush

Excerpt: Beyond the relevant AFI, there is little Air Force guidance available to JAGs on the administration and prosecution of magistrate court cases. This article identifies four practical ways JAGs can achieve success as SAUSAs in federal magistrate court....

Operations and International Law – Operations and International law capabilities enhance command situational awareness, maximize decision space, and promote optimal conditions for the projection of ready forces to defend the Nation and our allies.

PLAYING THE MIDFIELD

Posted: 4 November 2019

By Colonel Jeremy S. Weber

Excerpt: Law plays a central role in national power, and pretty much every other area of life. It is time we recognize a legal instrument of power to better incorporate the legal domain into our strategic planning.

ADMINISTRATIVE INVESTIGATIONS AND NON-JUDICIAL PUNISHMENT IN JOINT ENVIRONMENTS

Posted: 23 May 2019

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Excerpt: Intended to be an initial reference when conducting investigations or shepherding NJPs in a joint environment. By flagging the most salient distinctions between the services' rules, our goal is to help the JAG practitioner keep an eye out for potential pitfalls.

AUTONOMOUS WEAPONS NEED AUTONOMOUS LAWYERS

Posted: 10 April 2019

By Colonel Walter "Frank" Coppersmith

Excerpt: Timely adoption of AI inside today's U.S. Air Force legal practice will be essential for attorneys trying to keep pace with clients and organizations now operating at Internet speed and cloud computing scale.

CIVIL PROTECTIONS AND REMEDIES FOR SERVICEMEMBERS

Posted: 8 August 2019

Book Review by Ms. Cornelia Weiss, Colonel (Ret), USAF

Excerpt: "Civil Protections and Remedies for Servicemembers" addresses legal obstacles that military members face with detailed section titles "in order to aid...in turning to just the right page when needed.

THE LAW OF WAR

Posted: 18 July 2019

Book Review by Mr. Brian L. Cox, Captain (Ret), USA

Excerpt: Despite any perceived flaws and limitations, the *DoD Law of War Manual* offers a consolidated collection of commentary on a vast array of topics involving the law of war.

CRAZY HORSE AND CUSTER

Posted: 19 June 2019

Book Review by Major Christopher T. Stein

Excerpt: *Crazy Horse and Custer* is an apologia for the military justice system and the Judge Advocate General's Corps.

A Movement for Temperance:

A Principle, a P.O.W., and a Values-Based Plan for the Future Force

BY LIEUTENANT COLONEL BENJAMIN F. MARTIN, USAF

In an Air Force with less directive guidance, Airmen will need to now consciously weigh their actions against the values of the service.

You work in a glass house. Your glass house affords you a unique view with excellent glass house neighbors. You've grown comfortable in these surroundings, because, as a member of the Judge Advocate (JAG) family, you've come to accept that legal work ruffles feathers, invites scrutiny, and that intemperate personal or professional conduct undermines otherwise sound legal advice. As a result of the scrutiny our work invites, generations of attorneys and paralegals have come up through the force acutely aware of their responsibility to not only weigh their actions against black-letter law and regulation, but also to act in accordance with more abstract moral considerations, ideas embodied in the JAG Corps' principles and Air Force Core Values. Currently, the Air Force is undergoing a process to review and reduce the number of instructions and publications that guide Airmen. In an Air Force with less directive guidance, Airmen will need to now consciously weigh their actions against the values of the service.

This article first contemplates our responsibility to guide Airmen with lessons of temperance learned from life in the glass house and offers the philosophy of a "stoic" Prisoner of War (P.O.W.) in Vietnam. The next section considers the interplay between the JAG principles and Core Values, and outlines a role for attorneys and paralegals in the development of Airmen as moral actors. Moving forward, the JAG Corps should formally elevate temperance to equal standing alongside the JAG principles of wisdom, valor, and justice, and embrace our role as Core Values educators to the force.

APPLIED TEMPERANCE

Admittedly, temperance is not sexy. That's kind of the point. **Temperance** consists of disciplined self-control and "habitual moderation."[1] Examples abound throughout legal offices. In the courtroom, the prosecutor exercises temperance when delivering a reasonable sentence recommendation that conforms to the facts as they actually presented themselves at trial. Further down the hall, the discharge paralegal exercises temperance by rejecting a second piece of cake and avoiding the inconsistency of drumming out Airmen for failure to meet fitness standards, while they strain to fit in their service dress. In the leadership section, the Staff Judge Advocate exercises temperance by listening openly when first approached with a commander's "creative" solution or "innovative" program. As the office empties for a social gathering at the club, the Law

Office Superintendent exercises temperance by limiting his or her alcohol consumption to model appropriate behavior for the young JAGs and paralegals in attendance. These lessons of self-control are then carried from the legal office to deployed locations across the globe. Temperance guides the attorney that acts amidst a din of activity to calmly consider the law of armed conflict before green-lighting a proposed strike. Temperance is everywhere in the JAG Corps. It directs our daily actions and operates as a key provision in our glass house lease.

"Stoic philosophers have long held that the four virtues for moral living are **wisdom, courage, justice, and temperance**"

- **Wisdom**
  The ability to navigate complex situations in a logical, informed and calm manner
- **Courage**
  Not just in extraordinary circumstances but facing daily challenges with clarity and integrity
- **Justice**
  Treating others with fairness even if they have done wrong
- **Temperance**
  The exercise of self-restraint and moderation in all aspects of life

~Learn more at: TedEd, The Philosophy of Stoicism, https://ed.ted.com/lessons/the-philosophy-of-stoicism-massimo-pigliucci

In recognition of the favored status precedent plays in the hearts of lawyers, there is *significant* historical precedent in favor of temperance standing alongside the other JAG principles. Stoic philosophers have long held that the four virtues for moral living are wisdom, courage, justice, and temperance.[2] In this context, let's treat courage and valor as synonyms. The Stoics are a good group for consideration and study. **Stoicism offers a practical philosophy** that focuses on how good people should think and behave in order to weather life's hardships and deprivations.[3] Moreover, whatever combination of legal profession and profession of arms you personally subscribe to, the Stoics are feted by both. We have the Stoics to thank for contributions to several time-honored legal principles, not least among them the presumption of innocence and the notion of a burden of proof.[4]

Stoic philosophy also has a long connection to military life, and poignantly steeled the resolve of **Admiral James Stockdale** during his **time as a P.O.W.** in Vietnam.[5] Stockdale became acquainted with Stoicism, and the philosopher **Epictetus**, during his time in graduate school.[6] Three years after his graduation, as he ejected from his smoldering A-4 and into seven years of captivity, he recognized the opportunity to practice the philosophy, "I'm leaving the world of technology and entering the world of Epictetus."[7]

Formal portrait of Rear Adm. James B. Stockdale in full dress white uniform.
U.S. Navy photo (RELEASED)

Rear Adm. James B. Stockdale is one of the most highly decorated officers in the history of the Navy, wearing 26 personal combat decorations, including two Distinguished Flying Crosses, three Distinguished Service Medals, two Purple Hearts, and four Silver Star medals in addition to the Medal of Honor. Later he obtained the rank of Vice Admiral, and is the only three-star Admiral in the history of the Navy to wear both aviator wings and the Medal of Honor.

As a military officer, Stockdale was drawn to the path Epictetus mapped for men and women to live a virtuous life.[8] First, Epictetus presented wisdom as a filter to ensure individuals practice good judgment, so that people "may not judge at random."[9] Second, he saw justice as "the sphere of what is fitting; that we should act in order, with due consideration, and with proper care."[10] Finally, Epictetus combined the concepts of courage and temperance. He believed that courage and temperance were both necessary

virtues to regulate desire, and that the individual must be trained "not to fail to get what he wills to get (courage) nor fall into what he wills to avoid (temperance)."[11] Epictetus would have regarded our current JAG principles as an "incomplete" equation. An Airman without temperance is likely to be viewed as foolish instead of wise, motivated by self-interest instead of justice, and prone to fits of foolhardy bravado instead of valorous courage. We remedy this weakness, and complete our JAG principles, with the full status inclusion of temperance.

Epictetus would have regarded our current JAG principles as an "incomplete" equation.

As a final note on the subject, temperance is also a key virtue for the rest of the force. In 1989, President George H.W. Bush, issued Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees."[12] This order, since supplemented by subsequent administrations, lays out 14 principles that guide military and civilian employees as they perform their duties on behalf of American tax-payers. In fact, 9 of the 14 principles describe behaviors that Airmen "shall not" perform in order to avoid the perception that the individual places their private interests above their public office. That's temperance too. This Stoic principle infuses our lives in the legal community, and provides significant meaning for the rest of the force.

PRINCIPLES+VALUES=MISSION ACCOMPLISHMENT

The addition of temperance to the JAG Corps' principles does more than complete an incomplete "virtues equation"; our expanded principles inform and invigorate the Air Force Core Values. Organizational values statements are the vehicle to guide employees to act within the organization's left and right limits. In the ideal construct, organizations with impactful values statements don't need directive guidance, because they overflow with empowered individuals prepared to take action on behalf of the organization, secure in the knowledge that their actions comply with the company's values. This is also an ideal state for the Air Force. If the Air Force is truly moving towards a future of fewer and shorter instructions, Airmen will be expected to measure their actions, not against black-letter regulations that deny or grant permission, but against the demands of the Core Values. Unfortunately, values statements run the risk of being minimized as hokey or overly idealized. How often have you seen Airmen that maneuver at the speed of permission, desperate for top-cover from a single career-killing mistake? This is a values problem, and a recipe for failure. It is not reasonable to expect Airmen to be checklist-following automatons in garrison, who then magically transform into creative problem-solvers when deployed. The Air Force needs value-driven leaders that practice value-driven decision-making while in garrison.

JAG Corps members should consider themselves as the Office of Primary Responsibility for protecting the Core Values.

While "Core Values" is not an Article 6 checklist item, JAG Corps members should consider themselves as the Office of Primary Responsibility for protecting the Core Values. Secretary of the Air Force Heather Wilson highlighted this responsibility when she explained that commanders know that their JAG functions as the "conscience by their side," and further that the JAG Corps is "how America takes its values to war."[13] Secretary Wilson charts a noble role for JAG Corps members, one we should embrace. The alternative to her ideal is to be cast in an uninspiring role as either a walking encyclopedia expected to demonstrate automatic recall of black-letter law or live life as the human embodiment of "no." I've heard a current rated senior leader comment that our community inculcates habits of mind that separate us from many of our contemporaries. Men and women with our skillset don't become obsolete during a publications reductions initiative. Our work changes, as we shift workload from e-publishing research assistant to Core Values guides. Considered together, Airmen need the Core Values, and the Core Values need JAGs.

It is insufficient for leaders to walk the walk, if they don't tell Airmen about the Core Values that guided their steps.

One warning must be offered about the Core Values; they are ill-equipped to stand on their own. Several years after the Air Force Core Values were initially promulgated, Colonel Charles Myers proposed that the Core Values could function as a guide for Airmen seeking to navigate the increasingly complex operating environment. He also offered one caveat, with the warning that, "a person can be forthrightly honest, forget about self, and achieve excellent results—all for the sake of an evil purpose."[14] As a means to remedy this weaknesses, the "Little Blue Book" supplements the Core Values with a series of virtues such as accountability, mission, and teamwork.[15] These virtues are capable of straining the plain meaning of the Core Values to cover all manner of good deeds and praiseworthy behavior. The use of semantic manipulation is not a new practice in the Air Force. For example, the original "Little Blue Book" argued that "integrity" consisted of courage, honesty, responsibility, accountability, justice, openness, self-respect, and humility.[16] While these efforts attempt to mold the Core Values into everything for everyone, in practice, Airmen are more likely to boil down the Core Values to a single concept of similar, albeit diminished, value. These diminished concepts must be elevated by leaders. It is insufficient for leaders to walk the walk, if they don't tell Airmen about the Core Values that guided their steps. It is insufficient for leaders to promote their own personal "Top Ten" list of workplace virtues, if they cannot immediately thereafter ground those ideals in the Core Values. This is where attorneys and paralegals must step in. If we are to be the "conscience" of the Air Force, we must seize this opportunity to talk about the Core Values, and do so through the lens of our JAG principles.

THE CORE VALUES CONSIDERED

As a junior trial counsel, adorned with a ribbon rack that telegraphed my inexperience, I unsuccessfully attempted to invoke the Core Values during sentencing argument on…more than one occasion. Looking back, I know that those attempts came off as forced and unnatural. The Core Values weren't concepts I'd infused with personal meaning, and I didn't have sufficient practice "speaking" values in my daily legal practice. I don't think I was alone in this. Notwithstanding this misfire, successful values conversations can be held. We should start small. Legal personnel practice this skillset, and make in-roads to our audience, by referencing the Core Values in draft administrative paperwork and nonjudicial punishment reprimands. Our conversation continues during annual ethics training, when Airmen are challenged to use the Core Values as a lens to understand the basis for the myriad ethical rules that guide their conduct. The conversation culminates when JAG Corps personnel provide legal advice that transcends black and white recitations of the law on issues such as ethics, morality, and justice. Our work is complete when senior leaders reflexively employ the "grammar of moral reasoning" when initiating conversations with the legal office, because they understand the language we speak.[17]

Integrity

In order to encourage your own reflection about the intersection of the Core Values and principles, I offer several personal reflections for your consideration. First, integrity. Frequently, integrity is understood simply as a synonym for honesty, or cast as "doing what's right even when no one is looking." While this rule of thumb is valuable, integrity is primarily a matter of employing consistent action. Airmen "do what's right," because, at their core, they are constitutionally unable to do otherwise. Audience is irrelevant. Consistency, however, is a temporary state that must be continuously pursued. Wisdom facilitates this pursuit, and represents the ability to analyze our actions, consider our animating motivations, identify inevitable inconsistencies between ideals and behavior, and finally guide us to make the "right" judgment.

For example, consider the generation of Air Force leaders brought up as "servant leaders." A "servant leader" places the needs of their people above their own and values mentorship to junior troops. They serve. Presumably, Air Force "servant leaders," those that value mentorship and develop

subordinates, will leave their office at a reasonable hour because they place similar value on the opportunity to coach their child's soccer team and assist with algebra homework. Is this the behavior we see in practice in our workplace? Maybe? Sometimes? We can all likely cite a few famous people whose actions behind closed doors appear wildly disconnected from their public persona, so we know that integration isn't just an Air Force problem. When an Airman displays markedly different behavior on and off-duty, they lack integrity. They either fail to adequately reflect on their inconsistencies, lack the wisdom to identify the issue, or daunted by the challenge resign themselves to an inconsistent standard. Airmen need wisdom to consider themselves as moral actors and identify solutions to bridge disconnects between their actions and ideals.

Service Before Self

As with the Core Value of "integrity first," the Core Value of "service before self" is susceptible to misapplication, as Airmen focus on "before self," and interpret this Core Value as a one-step flow chart to call upon when balancing competing professional and personal responsibilities. Balance is a temporary achievement, one that calls to mind the image of a playground see-saw that achieves equilibrium only briefly while on its journey into a period of opposite and increasing imbalance. For many Airmen, work-life "balance" appears less as an achievable goal and more as an unrealistic taunt birthed from the dreams of an out-of-touch idealist. Moreover, the mental imagery of a scale unhelpfully casts personal and professional life as two wholly separate and independent spheres.[18] In the modern information era where military members are instantly connected and always available, it appears increasingly impossible to draw a firm and unimpeachable line between personal and professional time. The two spheres continuously merge and mesh, and only with great effort are adequately separated. Airmen seeking to juggle their work responsibilities and home life may do better to refer back to the Core Value of "integrity first," and question whether their choices, on balance, demonstrate consistent work-life integration.

What then, can we draw from "service before self"? Airmen may find more value from this Core Value if they use it as an opportunity to consider the motivation for their actions and the "why" that motivates their service. In the JAG Corps, attorneys from both sides of the aisle serve justice. Justice, however, is a concept that abounds throughout the service, as all Airmen take an oath to uphold the Constitution. A Special Warfare Airman serves justice when following the rules of engagement and law of armed conflict. A First Sergeant serves justice when reading Article 31 rights to an Accused. An Airman serves justice when stepping in as an active wingman to stop bullying and harassment of friends or co-workers. A commander serves justice, and encourages the practice in others, when he addresses a gathered assembly and plainly tells them that, "if you can't treat someone with dignity and respect, then you need to get out."[19] With justice at its heart, the Core Value of "service" becomes much more than a reminder about appropriate work-life balance. Once invigorated, the value now calls to mind an image of the scales of justice, challenges Airmen to reflect on their oath and why they serve, and builds upon Airmen as morally integrated actors.

Excellence In All We Do

The final Core Value, "excellence in all we do," also benefits from application of the JAG principles, specifically the virtue of valor and the proposed virtue of temperance. Unlike our counterparts in the civilian sector, excellence cannot be measured in working capital or market share. The dirt, grime, and friction inherent in military operations requires Airmen to display imperfect excellence in demanding conditions. Unfortunately, in our recent past the Air Force conflated the Core Value of "excellence" with the idea of checklist perfection.

Several years ago the service shifted from a "compliance" to an "effectiveness" inspection format.[20] In considering the move, the Air Force realized that the compliance inspection model glossed over true measures of daily mission readiness, and defined "excellence" in a manner that Airmen were only able to artificially simulate for the brief period they were being inspected.[21] This mindset, that excellence is

synonymous with perfection, is sure to rear its head again within the service. Vestiges of compliance thinking remain deeply rooted in our culture. The JAG principles of valor and temperance can stem that tide by encouraging all Air Force leaders to identify excellence in its true form – when Airmen act with valor to do what must be done, and apply temperance to avoid mistakes that undermine the legitimacy of their acts.

WAY FORWARD

Moving forward, it is clear that temperance deserves a formal upgrade to sit as an equal alongside our other principles. Practically speaking, the greatest initial effort for this initiative will be spent on edits to the signage on our front doors. Thereafter, the real work begins, as attorneys and paralegals begin proactively identifying situations in which the Core Values and expanded JAG principles can be applied to real-world situations. We must embrace our role as Core Values educators, and draw Airmen out from behind the comforting cover of technical orders and instructions that deliver the "correct" answer. Epictetus explained that the fruit of the four Stoic virtues was, "tranquility, fearlessness, and freedom."[22] Similarly, our efforts will bear fruit, and culminate in an emboldened generation of air power leaders that operate consistently within our values, but without need for volumes of regulation. When we combine our Core Values and principles with temperance, Airmen will be empowered to operate with greater confidence, independence, and moral resolve knowing their actions are consistent in service toward a common goal.

ABOUT THE AUTHOR

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **Center for Creative Leadership:** What Are the Characteristics of a Good Leader? (Apr 17, 2018)
- **Col Charles R. Myers:** The Core Values: Framing and Resolving Ethical Issues for the Air Force (USAF Air Power Journal, Spring 1997)
- **TED Ed:** The Philosophy of Stoicism (5:29)
- **TED Talks:** Stoicism: Why you should define your fears instead of your goals (Apr 2017, 10:45)
- **The Sextant:** Navy Legend Vice Adm. Stockdale Led POW Resistance (Nov 13, 2015)

ENDNOTES

[1] *Temperance*, Merriam-Webster n.d. Web, https://www.merriam-webster.com/dictionary/temperance (last visited July 27, 2018).

[2] Massimo Pigliucci, How to be a Stoic: Using Ancient Philosophy to Live a Modern Life 19 (2017).

[3] James B. Stockdale, The Stoic Warrior's Triad: Tranquility, Fearlessness and Freedom 2, https://www.usna.edu/Ethics/_files/documents/stoicism1.pdf (last visited Apr. 27, 2018).

[4] *Id.*

[5] James B. Stockdale, Stockdale on Stoicism II: Master of My Fate 1, https://www.usna.edu/Ethics/_files/documents/stoicism2.pdf (last visited Apr. 27, 2018).

[6] Stockdale, *supra* note 3, at 8.

[7] *Id.*

[8] Epictetus, Discourses Books 3 and 4, 6 (P.E. Matheson trans., 2004).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Exec. Order. No. 12674 (1994), https://www.oge.gov/Web/OGE.nsf/Executive%20Orders/FA480E559E89F43A85257E96006A90F0/$FILE/2cffba1932d54681af32485c48d855282.pdf?open (last visited July 27, 2018).

[13] Heather A. Wilson, Secretary of the Air Force, 2017 Horizons Summer Conference Official Remarks (Aug. 28, 2017).

[14] Charles R. Myers, *Framing and Resolving Ethical Issues for the Air Force*, Airpower Journal 40 (1997), www.dtic.mil/get-tr-doc/pdf?AD=ADA529801.

[15] U.S. Dep't of the Air Force, America's Air Force: A Profession of Arms (July 2015), www.airman.af.mil/Portals/17/001%20Home%20Page/005_The_Little_Blue_Book/Profession%20of%20Arms_Final_For%20Screen.pdf?ver=2015-08-21-135633-620 (last visited July 27, 2018).

[16] U.S. Dep't of the Air Force, Air Force Blue Book on Values (Jan. 1, 1997), http://www.au.af.mil/au/awc/awcgate/cv-mastr.htm (last visited July 27, 2018) [since being cited, this link appears to no longer be available].

[17] Myers, *supra* note 14, at 41.

[18] Haas Sch. of Bus., Univ. of Cal., Berkeley, *Work/Life Integration*, https://www.haas.berkeley.edu/human-resources/life-integration/ (last visited Apr. 27, 2018).

[19] Jonah Engel Bromwich, *Air Force General Addresses Racial Slurs on Campus: 'You Should Be Outraged'* N.Y. Times, Sept. 29, 2017, https://www.nytimes.com/2017/09/29/us/air-force-academy-racial-slurs.html.

[20] U.S. Dep't of the Air Force, Air Force Instr. 90-201, The Air Force Inspection System, para 4.1, 4.2 (Apr. 21, 2015).

[21] Frank Camm et al., Charting the Course for a New Air Force Inspection System 38 (2013), https://www.rand.org/content/dam/rand/pubs/technical_reports/TR1200/TR1291/RAND_TR1291.pdf (last visited July 27, 2018).

[22] Stockdale, *supra* note 3, at 18.

How to Achieve Success in Federal Magistrate Court

BY CAPTAIN DAVID K. ROLEK & CAPTAIN GABRIEL W. BUSH

Beyond the relevant Air Force Instruction (AFI), there is little Air Force guidance available to JAGs on the administration and prosecution of magistrate court cases.

Many legal offices across the Air Force administer a federal magistrate court program, with judge advocates (JAGs) appointed as Special Assistant U.S. Attorneys (SAUSAs) to prosecute misdemeanor offenses committed by civilians on areas of federal jurisdiction.[1] Beyond the relevant Air Force Instruction (AFI), there is little Air Force guidance available to JAGs on the administration and prosecution of magistrate court cases. Based on lessons learned from the Air Force's largest magistrate court program, this article identifies four practical ways JAGs can achieve success as SAUSAs in federal magistrate court[2] and offers a brief concluding case study.

Relationships are the key to administering an effective magistrate court program.

(1) GET TO KNOW THE KEY PLAYERS

Relationships are the key to administering an effective magistrate court program. A JAG who has only prosecuted courts-martial may be unfamiliar with the critically important allies he or she must team with to be successful in this forum. This section will explain the roles and capabilities of the players and agencies with whom a magistrate court JAG should establish a good working relationship.

The United States Attorney's Office (USAO)

In the world of military justice, trial counsel will typically consult with the Deputy Staff Judge Advocate (DSJA), Staff Judge Advocate (SJA), and/or Senior Trial Counsel (STC) in preparation for trial. While the DSJA and SJA are still available to provide guidance, a SAUSA's primary advisor is the Assistant U.S. Attorney (AUSA) appointed as the liaison to the military installation.[3]

The AUSAs are typically eager to provide guidance to JAGs prosecuting these on-base misdemeanor offenses that may not otherwise be a priority for them.

The JAGs serving as SAUSAs should work closely with their assigned AUSA and utilize her or his expertise and familiarity with the magistrate court forum. An AUSA can provide invaluable input on charging determinations, charging language, how to interact with the court and other agencies, appropriate plea offers for defendants, sentencing recommendations, and any other questions that arise along the way.

The AUSAs are typically eager to provide guidance to JAGs prosecuting these on-base misdemeanor offenses that may not otherwise be a priority for them. To put this in perspective, and according to the United States Attorney for the Western District of Texas, Richard L. Durbin Jr.:

> "[T]he U.S. Attorney's Office would not have the personnel to address the large volume of cases that arise on military properties in San Antonio. It is so important to the work of our service members that order and discipline be observed throughout these properties. It is only through the fine work of the magistrate court SAUSAs who regularly appear in federal court that there is an effective prosecution program that supports the mission of Joint Base San Antonio. Their participation on this program is invaluable."[4]

The United States Pretrial Services Office (PSO)

Once a defendant is charged with a misdemeanor in magistrate court, he or she is typically released on bond while awaiting trial. While on bond, the court expects the defendant to be on her or his best behavior. The court monitors the defendant by assigning a pretrial services officer (PSO), who ensures the defendant complies with any limitations set by the court.[5] Should the defendant violate a bond condition, the PSO can file a petition with the court to place the defendant in pretrial confinement or the pretrial violation can be used as an aggravating factor at sentencing. For these reasons, it is vitally important that SAUSAs maintain open lines of communication with the PSO.

The United States Probation Office (USPO)

A term of probation is a common sentence for magistrate court defendants, especially first-time offenders. While serving probation, the defendant will be assigned to a United States Probation Officer (USPO) to ensure she or he complies with the conditions set by the judge.[6] If the defendant violates one of these conditions, the USPO can petition the court to revoke probation, subjecting the defendant to the maximum penalty that could have been imposed at the original trial.[7] The USPO is typically the government's key witness to prove the defendant's violations at a probation revocation hearing.

The USPO is an important ally even before the trial is held. In every case, the USPO makes a recommendation to the magistrate judge as to the appropriate sentence for the defendant, taking into consideration the **U.S. Sentencing Guidelines**,[8] the defendant's criminal history, and the defendant's performance while on bond. The prosecuting SAUSA should contact the USPO before trial to discuss the USPO's recommended sentence. By doing so, the SAUSA can be confident that a proposed plea offer is appropriate, and will avoid recommending an unreasonable sentence at trial.

The Clerk of the Court

Because JAGs are often unfamiliar with the procedural differences between magistrate court and courts-martial, having a good working relationship with the clerk of the court is invaluable. Successful SAUSAs will establish a relationship with the magistrate judge's clerk or deputy. The clerk is responsible for many of the administrative functions that are the government's responsibility at a court-martial.[9] More importantly, a magistrate judge's clerk knows her or his judge's preferences on countless courtroom issues and can provide guidance on what to expect during different types of hearings.

(2) GET TO KNOW YOUR BASE

No two magistrate court programs are the same, so understanding the local geography and community are vital to success in federal court. Knowing your base includes

understanding trends of the types of crimes being committed, their frequency and location, and the perpetrators who commit them. With this understanding, the SAUSA will know where to focus her or his efforts, improve training, and develop best practices.

> Knowing your base includes understanding trends of the types of crimes being committed…

For example, from June 2016 through June 2017, the Joint Base San Antonio (JBSA) magistrate court program brought charges against over 100 criminal defendants. Of those, 42 were for driving while intoxicated (DWI) and 30 involved drug related offenses. Of these DWI and drug charges, 74% occurred at Fort Sam Houston. Why is Fort Sam Houston such a hot spot for DWI and drug charges? A closer look at the city of San Antonio and its history provides some insight.

San Antonio is part of Bexar County, which has historically had one of the highest drunk-driver rates in the nation.[10] The result is an average of one to two DWI offenses being committed somewhere on JBSA each week. Fort Sam Houston sits in the heart of San Antonio, just blocks away from the downtown metropolitan area, concert venues, scores of bars, and individuals coming and going from the city. Until 2003, Fort Sam Houston was open to the public as a thoroughfare and some GPS devices continue to direct drivers to gas stations and services located on base.[11] Entry control points often do not appear on GPS devices and civilians are caught off guard when they round a corner to find themselves facing a military checkpoint guarded by armed security forces.

Fort Sam Houston also draws an unusually high number of visitors to the **San Antonio Military Medical Center (SAMMC)**—the Department of Defense's (DoD) largest inpatient hospital—located inside the installation.[12] Non-DoD affiliated civilians are also eligible for emergency services at SAMMC and are frequently rushed onto base in ambulances. During treatment, personal items are inventoried and security forces are notified if contraband is discovered. JBSA SAUSAs routinely prosecute these non-DoD affiliated civilians who arrive at SAMMC with illegal substances.

Getting to know the unique aspects of JBSA has helped identify DWI and drug possession as serious problems for the installation. As a result, steps were taken to bolster successful prosecution of these offenses. The magistrate court program enhanced training with security forces to detect signs of intoxication, conduct standard field sobriety test (SFSTs), execute probable cause searches, properly preserve evidence, and obtain breath samples. Entry control points next to freeways and public roads at which DWIs most frequently occur have been identified, and security forces has been provided with handheld cameras to ensure all DWI stops are recorded. The base has also developed an on-call system where the Federal Bureau of Investigation (FBI) is notified and can respond to felony-level DWIs or off base pursuits. By understanding the installation and the community, a SAUSA will be better prepared to address misconduct when it occurs.

> The Air Force's interests in holding civilian offenders accountable for on-base misdemeanors are often different than its interest in prosecuting courts-martial.

(3) IDENTIFY THE APPROPRIATE DISPOSITION FOR CIVILIAN MISCONDUCT

The Air Force's interests in holding civilian offenders accountable for on-base misdemeanors is often different than its interest in prosecuting courts-martial. Furthermore, the Air Force's interest in a civilian offender can vary greatly depending of the status of the civilian.[13]

What then should a SAUSA consider when deciding how best to address on-base civilian criminal misconduct? The first step is to decide the appropriate forum for the misconduct. A JAG should first assess whether any of the administrative

tools available will achieve the Air Force's objectives. For example, if a government contractor threatens an active duty member, will debarment from the installation be sufficient? If a dependent child is caught stealing $20 worth of costume jewelry from the Base Exchange (BX), will a revocation of BX and Commissary (Defense Commissary Activities—DeCA, hereafter) privileges be sufficient to address the problem? In other words, the SAUSA should first consider whether administrative remedies such as debarment, revocation of driving privileges, loss of BX/DeCA privileges, or adverse employment actions for government employees can satisfy the Air Force's interest in addressing civilian misconduct.

Another option available in most federal jurisdictions is **pretrial diversion**. Pretrial diversion is a program run by the U.S. Pretrial Services Office that can be a useful rehabilitative tool for first-time civilian offenders. An offender who participates in the program agrees to be monitored by a PSO for a period of 3 to 18 months, and will serve what amounts to a period of probation. If the offender stays out of trouble and satisfies all conditions set by the PSO (such as completion of a set number of hours of community service, or payment of restitution), the government agrees to not prosecute the offense. The program is valuable, if satisfactorily completed, because it rehabilitates the offender without the investment of resources in a full-on prosecution of the case.[14]

Some on-base civilian misconduct is serious enough that a federal conviction is warranted.[15] Once charges are filed, the SAUSA must then ask, "What is the goal of this prosecution?" The goal may be pursuing a federal conviction for the offense in order to deter future similar misconduct. This may be the case when the defendant has no DoD affiliation. Alternatively, the offense may be serious enough that confinement or a monetary fine is necessary to achieve justice. In these cases, a SAUSA should consult with their AUSA to ensure the defendant is being charged in the appropriate forum. In cases of egregious misconduct, having the AUSA prosecute the case at the felony level may be most appropriate. In the authors' experience, magistrate judges rarely sentence defendants to confinement for these misdemeanor offenses, absent a pre-existing criminal history. If punishment beyond probation is imposed, the most common additional punishment is a nominal fine between $100 and $500.

> By identifying the government's interest early, SAUSAs will know which points he or she is willing to cede and which are non-negotiable.

These are important points to keep in mind when engaging in plea negotiations with defense counsel. By identifying the government's interest early, SAUSAs will know which points he or she is willing to cede and which are non-negotiable. Plea agreements allow SAUSAs to achieve justice without expending unnecessary resources, often for little, if any, additional benefit. A typical plea agreement might offer to dismiss a lesser charge in exchange for a guilty plea to a more serious charge or the government may agree to make a non-binding sentencing recommendation to the magistrate judge.[16] If SAUSAs identify the Air Force's interest in a civilian offense/offender early, they can save themselves considerable headache by avoiding unnecessary battles.

(4) MAKE SMART CHARGING DECISIONS

Over the course of a magistrate court prosecution, a SAUSA will make several strategic decisions that will affect the outcome of a case. The SAUSA's first strategic decision is determining which offense(s) to charge. The charges filed impact the forum, the law that will apply, and the sentence that can be imposed—all of which are vital to achieving a successful, just prosecution of a criminal offender.

SAUSAs have at their disposal the full spectrum of federal misdemeanor offenses, as well as the misdemeanor offenses of the state in which the crime is committed. Under 18 U.S.C. § 13 (2017), SAUSAs are able to assimilate state offenses into the magistrate court charging document.

SAUSAs should consider whether the case can be charged as either a Class A or a Class B misdemeanor. Defendants charged with Class A misdemeanors are entitled to a jury trial, whereas defendants charged with a Class B misde-

meanor are not.[17] If a case involves issues that would likely confuse the jury or might result in jury nullification, SAUSAs can make the strategic decision to charge a lesser offense (Class B) in order to ensure a (magistrate) judge will be the finder of fact and apply the law appropriately.[18] Additionally, SAUSAs should closely examine a case and consider charging every offense that has been committed. By charging all offenses for which the prosecution has a good-faith basis, SAUSAs garner additional flexibility in reaching a plea agreement.[19] SAUSAs will also have a wider range of misconduct to address in sentencing, and will avoid evidentiary problems that could result from introducing uncharged misconduct during trial.

SAUSAs should also be aware of their ability to petition the court to place a defendant in pretrial confinement under certain circumstances. If a defendant is facing other federal or state court charges, poses a risk to the community, or is a flight risk, under federal law the magistrate judge is authorized to detain the defendant until trial.[20] If the defendant is sitting in pretrial confinement, defense counsel will likely be motivated to resolve the case quickly—which may help facilitate a plea agreement to achieve swift justice.

These Principles in Action: A Brief Case Study

By way of example, a case prosecuted at JBSA in 2016 shows how these principles can be applied in practice.

The defendant had been transported to SAMMC after having his jaw broken into three pieces during a fight at a halfway house. Upon conducting an inventory of his belongings, hospital personnel found methamphetamine, for which he was charged. Security and hospital personnel followed the magistrate court program's training and flawlessly preserved the chain of custody. The defendant had an extensive criminal record, including three prior drug possession convictions, and the judge ordered him to be detained as he awaited his trial because he was a flight risk. The government's evidence was strong and the defense's end goal was clear: move the case as quickly as possible to get the defendant out of jail. The defense was initially open to a plea agreement, but only on terms that did not involve confinement. As prosecutors, it was tempting to push for a trial and up to 12 months confinement. However, upon further examination and coordination with the FBI and the AUSA liaison, the SAUSAs learned the defendant was involved in running a prostitution ring for prisoners.

With this knowledge, the government's end game changed. The defendant's involvement in the prostitution ring would result in felony charges; confinement would be more likely and more extensive for that charge than in a magistrate court case. The government also knew a conviction in a magistrate court case would bolster the sentence in the felony case to come. The SAUSA decided that, given these circumstances, justice could be best achieved in magistrate court with a plea offer that involved no confinement. The defense jumped at the offer and the defendant pled guilty in magistrate court two days later. Defense counsel and their client were smug at the hearing, thinking they had strong-armed their will to victory. The next day, however, the defendant appeared on statewide news after being indicted for his involvement in the prostitution ring. Defense counsel was notified that his client was transferred back to federal confinement to await trial on felony charges.

CONCLUSION

In federal magistrate court SAUSAs should work to develop strong relationships with their USAO and courthouse staff. Further, SAUSAs should study criminal trends, respond effectively, manage caseloads efficiently, remain open to creative plea deals, and craft charges with the end goal of justice in mind. If these techniques are employed, success will inevitably follow, thereby fostering better magistrate programs and SAUSA-litigators across the Air Force.

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **USCourts.Gov:** Probation and Pretrial Officers and Officer Assistants, https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer
- **YouTube:** Magistrate Judges: Serving the Judiciary and the Public (4:11), https://www.youtube.com/watch?v=v81yi5GbECc&feature=youtu.be

ENDNOTES

[1] U.S. Dep't of Air Force, Instr. 51-905, Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians, para. 2.3.1 (Sept. 30, 2014) [hereinafter AFI 51-905].

[2] In 2016, the JBSA legal offices consolidated the magistrate court functions from Fort Sam Houston, Lackland, and Randolph into a single magistrate court office, which operates out of JBSA-Fort Sam Houston. From July 2016 to June 2017, the JBSA magistrate court office reviewed more than 300 civilian (non-traffic) misdemeanor investigations and adjudicated more than 150 civilian offenses.

[3] AFI 51-905, *supra* note 1, at para. 2.3.1 ("Attorneys [appointed as SAUSAs] come under the supervision of the appropriate U.S. attorney in the performance of those duties, and may perform only those duties, under such supervision…").

[4] Statement of Richard L. Durbin, Jr., United States Attorney for the Western District of Texas, in San Antonio, Texas (June 6, 2017) (on file with author).

[5] Typical bond conditions include refraining from additional criminal misconduct, drug and alcohol testing, and maintaining employment.

[6] Typical probation conditions include abstinence from drugs and alcohol, payment of a fine or restitution, regular meetings with the USPO, and rehabilitation programs related to the offense for which the defendant was convicted.

[7] 18 U.S.C. § 3565(a)(2) (2017).

[8] Federal Sentencing Guidelines Manual (U.S. Sentencing Comm'n 2016), https://www.ussc.gov/guidelines (last visited Aug. 7, 2018).

[9] For example, functions handled by the judge's clerk include scheduling hearings with the parties, jury member contact, and post-trial administration.

[10] Stephanie Sera, *Recent Drunk-Driving Fatalities a Concern for MADD*, KSAT12 (Mar. 15, 2017), http://www.ksat.com/news/recent-drunk-driving-fatalities-a-concern-for-madd (last visited Aug. 7, 2018).

[11] In 2003, Fort Sam Houston was closed to the public in response to the September 11, 2001 terrorist attacks.

[12] Scott Huddleton, *SAMMC Now the Largest Military Medical Center,* mySA (Oct. 8, 2011), http://www.mysanantonio.com/news/military/article/New-CoTo-makes-SAMMC-largest-DoD-hospital-2207990.php (last visited Aug. 7, 2018).

[13] For example, the Air Force would typically have a greater interest in a civilian spouse who commits domestic violence against an active duty member than a non-DoD affiliated individual found with drug paraphernalia at an entry control point.

[14] Offenses appropriate for pretrial diversion may include first time possession of marijuana, theft under $250, or low-level assaults with minimal injuries. Pretrial diversion should only be offered when the government has sufficient evidence to prove the case at trial beyond a reasonable doubt. If the offender declines to participate in pretrial diversion, or subsequently fails pretrial diversion, the expectation is that the government will file charges against the offender. Check with the local USAO for guidance on offering pretrial diversion in your district.

[15] At JBSA, the most commonly prosecuted offenses are Driving While Intoxicated (18 U.S.C. § 13 (2017) (Involving Tex. Penal Code § 49.04) (2017)), Possession of a Controlled Substance (21 U.S.C. § 844(a) (2017)), Theft of Government Property (18 U.S.C. § 641 (2017)), Assault (18 U.S.C. § 113(a) (2017)), and Trespassing on Military Property (18 U.S.C. 1382 (2017)).

[16] Fed. R. Crim. P. 16(c)(1)(B). A binding plea agreement is permitted under Fed. R. Crim. P. 16(c)(1)(C), but judges frown upon such agreements in the Western District of Texas, viewing sentencing as within the purview of the court.

[17] Baldwin v. New York, 399 U.S. 66, 69 (1970).

[18] In a JBSA case, a defendant charged with a Class A misdemeanor DWI was a sympathetic senior citizen with prior military service. In a legally solid case, the government was ready to prove the defendant had an alcohol concentration over .30. As trial approached, the government ascertained that the defense would try to confuse the jury with burdensome technical information regarding the maintenance of the Intoxilyzer. The day before what was set to be a week-long trial, the government filed a motion to charge the defendant with a Class B misdemeanor DWI instead of the charged Class A misdemeanor. This move eliminated the defendant's right to a jury trial. The judge-alone trial was finished in one day and the government secured the conviction. The defendant received 18 months of probation and a $500 fine.

[19] It is advisable to reach out to the U.S. Probation Office ahead of time when considering modifying or dropping charges. The government's charging decisions impact their analysis of the case and sentence recommendation to the judge. Probation officers will become frustrated if they arrive to court and learn about changes to the charges for the first time just minutes before the proceedings are set to begin.

[20] 18 U.S.C. § 3142(d)-(f) (2017).

Nothing Says 'I Love You' Like a Contract

BY CAPTAIN MATTHEW H. ORMSBEE, USAF

Abstract: A community property agreement (CPA) is a unique estate planning device that could save considerable time and resources for the heirs of military members with relatively simple estates by avoiding the probate process. Air Force legal assistance attorneys are well positioned to advocate for greater usage of CPAs and to draft them with confidence, together with a will, using the Air Force's primary testamentary document drafting software.

As legal assistance attorneys and paralegals, we draft our clients' requested estate planning documents, oversee document execution, and generally consider our work done. But it is also our job to ensure that clients' later efforts to use their estate documents are as painless as possible. In other words, clients' estate planning should continue beyond the execution of the will to incorporate community property agreements (CPAs), when possible, to effectuate our clients' overall intent.

Estate planning should continue beyond the execution of the will to incorporate community property agreements (CPAs), when possible, to effectuate our clients' overall intent.

The probate process is often lengthy, bureaucratic, and expensive. For this reason, the probate process should usually be avoided.[1] Yet, as legal assistance attorneys and paralegals, we often focus on producing estate planning documents for our clients without considering which documents are most practical for their unique circumstances. As such, this article will explore how we can arm ourselves with knowledge on the array of estate planning documents at our disposal to fulfill our clients' wishes and assist in avoiding unnecessary probate.

COMMUNITY PROPERTY

Nine states—Washington, California, Nevada, Arizona, New Mexico, Texas, Louisiana, Wisconsin, and Idaho—apply the community property principle of law.[2] The U.S. Territories Guam and Puerto Rico also apply the community property principle of law.[3] Alaska has also adopted a community property system, but its residents must opt in for such provisions to apply to them.[4]

Under the community property regime, a spouse automatically owns one-half of all property acquired during the marriage, absent a written agreement to the contrary.[5] Property includes all money earned by either party during the marriage, anything bought with that money, and all debts incurred by either party.[6] Exceptions to this system deem ownership as spouse-specific for property if received as a gift or inheritance, or if otherwise obtained before the marriage.[7]

COMMUNITY PROPERTY AGREEMENTS

CPAs are notarized contracts in which two spouses agree: (1) to convert all their property, whenever and wherever acquired, into community property upon the death of the first to expire; and (2) to give all such property to the surviving spouse free of probate (and even successor beneficiaries in certain states).[8] Property included in a CPA completely avoids probate, while the parties' property that is excluded from the CPA may not avoid probate.[9] Because CPAs are contractual agreements, they remain valid even if the spouses should move to a common law state, if the agreements are valid at the time and place where they are executed.[10] Best of all, CPAs can easily be generated through the Wills Program in the Drafting Libraries™ software (hereinafter "DL Wills"). Within DL Wills, the option to generate a CPA is an automatic prompt for married testators claiming domicile in a community property jurisdiction.

> CPA is a vehicle for wholly avoiding probate.

While ownership by joint tenancy with right of survivorship is another option for property ownership by spouses without the need for probate, it also presents limitations that a CPA would avoid. For instance, while a CPA converts all included property owned by two spouses to community property on the date of the first spouse's death, ownership by joint tenancy with right of survivorship is a chosen method of ownership that is selectively applied to certain assets held by a couple, such as real estate. Thus, less valuable property, such as personal property, may not be significant enough to be legally held in a joint tenancy. Instead, furniture, firearms, or jewelry, for example, would simply be owned by one spouse and brought into the marriage without reflecting joint ownership of the property. Thus, a CPA is a vehicle for wholly avoiding probate, while ownership by a joint tenancy would save some but not all assets from probate. Finally, as discussed in the next section, when considering third party creditor claims to one spouse's property, keeping spouses' property separately owned may be well warranted until the date that the first spouse dies, in order to limit the extent of creditor claims to the second spouse's property.

CPAS LOVE COMPANY

While a CPA offers the enormous benefit of disposing of all of one's property without the need for a will (and without the complexity of a trust), it is not a stand-alone document. A CPA cannot completely replace a will, which is still useful to capture vital decisions concerning, for example, simultaneous death of spouses, guardianship, and disposition of separate property, such as property expressly excluded from a CPA. A CPA is inappropriate for these vital decisions and including them in a CPA might risk invalidating the agreement, since such issues are outside the scope of a CPA.[11] As an alternative to a CPA, spouses may place property in joint names. However, there are reasons to avoid placing property under joint names if, for instance, one spouse has considerable debts and wishes to keep creditors from reaching the joint property.[12] Further, in case of an inconsistency between a will and a CPA (or between joint ownership with a third party and a CPA), the CPA takes precedence.[13]

> Before turning to a CPA, a practitioner should be fully aware of the benefits and drawbacks of doing so.

FURTHER DETAILS

Before turning to a CPA, a practitioner should be fully aware of the benefits and drawbacks of doing so. First, a CPA is ordinarily an all-or-nothing document—meaning that, traditionally, all property owned by two spouses is included in the agreement.[14] While this means that specific gifts under a CPA are forbidden, spouses may nevertheless still expressly state in an attachment to the CPA which property is excluded from the agreement so that these items remain separate property. If such an attachment is not used, the surviving spouse will inherit all the CPA property and the deceased spouse's children will receive nothing—which may be important if there are concerns about a step-parent caring for a deceased spouse's child(ren).[15]

Second, clients must know the two ways to void a CPA. Spouses can either: (1) mutually consent in a written and notarized agreement that the CPA is voided (or amended, as the case may be); or (2) the CPA will be automatically voided if the spouses divorce or permanently separate.[16] Importantly, because CPAs are binding contracts, neither spouse, acting alone, can change or revoke them (contrast this with a will, which a testator can unilaterally revoke). Note also that merely separating, taking a "break" from the relationship, or living apart, without the intent to permanently separate, generally does not suffice to revoke a CPA, unless the verbiage of the CPA relaxes this commonly held standard (by stating, for instance, that separating for two months or longer shall suffice).[17] Clients must be aware that there is case law to suggest that in the event of conflicting language between a CPA and a will, or between a CPA and a claim of joint ownership, the CPA will not necessarily be found invalidated, and thus may still control.[18]The reasoning is that a later will disposing of property differently from a CPA is a *unilateral* choice, but the consent of both spouses is necessary to terminate a CPA.

Third, the limitations of CPAs must be clear. For instance, a CPA alone does not avoid probate for the surviving spouse, unless they later take additional steps to avoid probate.[19] As previously mentioned, a CPA also does not help in the case of the simultaneous death of spouses, nor does it permit gifts or specific dispositions. In addition, a CPA does not avoid probate for out-of-state real estate, which must be probated through an ancillary probate proceeding in the given state. Finally, a CPA may affect a spouse's eligibility for government benefits, though there is often language in a CPA stating that if an inheritance would disqualify a spouse for government benefits (e.g., Medicaid determinations), the spouse can disclaim to qualify. In such a case, the spouses may be better served with a special-needs trust, which allows the surviving spouse to benefit from inherited property without impacting government benefit eligibility.

Finally, each state provides its own rules on how to draft and execute a CPA. As a best practice, CPAs should be in writing and witnessed or notarized, so that they undergo the same level of scrutiny and review as other estate planning documents.[20] In some states, CPAs covering real estate may be filed in the county assessor's office where the real estate is located.[21] Thus, it is vitally important for legal assistance attorneys to review the state's laws on the subject and ensure that the CPA generated by DL Wills is facially in conformity with state-specific legal requirements.[22] While DL Wills currently takes into account state-specific requirements for estate planning documents, if a legal assistance attorney is given unorthodox or complex facts for a CPA–or if a legal assistance attorney does not feel comfortable advising on state laws regarding CPAs–it is advisable to suggest that the client see a private estate attorney.

CPAS TRAVEL

It is a fact of life that military members and dependents travel often. So long as a CPA is valid when and where it is originally executed, CPAs can travel with military members and retain their validity under the original state's laws, even if military members move to a non-community property state or a foreign country, and even if spouses change their residency.[23] This is because CPAs are contracts, and absent a contractual term to the contrary, contracts remain valid even if the parties change addresses. Indeed, another benefit of a CPA is that it may clarify the classification of property acquired by a couple during their multiple duty station assignments, whether community property or common law property. Note, however, that if a couple later moves to a common law state, all assets and debts acquired during the life of the marriage in such state shall be viewed in light of the common law property division rules, instead of community property rules. Nevertheless, real estate in a common law state that is bought with community property income can be treated as community property.[24]

CONCLUSION

CPAs should be used more often, since thousands of military members and dependents are stationed within community property jurisdictions. Many more will rotate through servicing legal offices in these states in the coming years. Given the number of service members changing station each summer–and the number of members domiciled in a community property state while stationed in a non-community property state–a substantial number of clients could benefit

from CPAs. Legal offices in community property states should inform clients of the benefits of having a CPA, which can effectuate the client's estate plan, while saving their heirs unnecessary stress and wasted time. By doing so, legal assistance attorneys and paralegals fulfill our mission to provide effective and efficient estate planning to our clients.

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ENDNOTES

[1] National Probate Court Standards, 3.2. Decedent's Estates, 40, http://www.superiorcourt.maricopa.gov/SuperiorCourt/ProbateAndMentalHealth/docs/Probate_National_Standards.pdf, (last visited Aug 11, 2018), ("Without simplifying and reducing the expense of estate administration, the current trend to avoid probate to transfer property at death will accelerate.").

[2] IRS Internal Revenue Manual, Section 25.18.1 Basic Principles of Community Property Law, https://www.irs.gov/irm/part25/irm_25-018-001, (last visited Aug. 11, 2018).

[3] *Id.*

[4] *Id.*

[5] This article speaks in terms of marriage and spouses, though some community property jurisdictions also extend community property principles to unmarried individuals in a registered domestic partnership. See, e.g., Charlotte K. Goldberg, Opting In, *Opting Out: Autonomy in the Community Property States*, 72 La. L. Rev. (2011).

[6] Each state's laws are different. A legal advisor must investigate each state's laws before advising a client based on widespread community property principles.

[7] IRS Manual, *supra* note 2, at Section 25.18.1.3.11.

[8] Karen E. Boxx, *Community Property Across State Lines*, A.B.A. (Jan/Feb 2005), https://www.americanbar.org/publications/probate_property_magazine_home/rppt_publications_magazine_2005_jf_communityProperty.html.

[9] Thomas M. Featherson, Jr., *Nonprobate and Probate Dispositions of Community Property*, Baylor U. Sch. of L. (2010), 14, https://www.baylor.edu/content/services/document.php/159727.pdf.

[10] Restatement (Second) of Conflicts of Laws § 259, (1971) (Notably, even using community property funds to purchase real property in a common law state would preserve the community interests of the spouses.) (hereinafter Second Restatement of Conflicts of Laws).

[11] Boxx, *supra* note 8. (Note, however, that a severability clause may preserve a CPA, minus a clause that exceeds the scope of a CPA, if the parties agree to a clause that is inappropriate for inclusion in a CPA.)

[12] Another reason would be to help a spouse qualify for Medicaid or social security.

[13] In re Estate of Bachmeier, 52 P.3d 22, at 26 (Wash. 2002).

[14] Morgan Hill, *Community Property Agreements* (2015), http://www.olympialegal.com/blog/2015/1/27/community-property-agreements, (last visited Aug. 11, 2018). (In addition, while spouses may hold separate property, which they solely own and control, "the law in the community property states does not favor this." IRS Manual, *supra* note 2, at 25.18.1.2.2. Thus, the majority of two parties' assets is generally included when a CPA is executed.)

[15] *Id.*

[16] In re Estate of Bachmeier, *supra* note 13, at 25.

[17] *Id.*

[18] *Id.*

[19] In Alaska and Wisconsin, a CPA can name a beneficiary to inherit the property at the *second* spouse's death. (In Washington, some commentators believe this is allowed, but courts have not explicitly said so.).

[20] A notarization can proactively address a later allegation that a party to a CPA did not actually sign the document. *See, e.g.,* Wash. Rev. Code § 42.45.080(2), which states, "The signature and title of an individual authorized by chapter 281, Laws of 2017 to perform a notarial act in this state are prima facie evidence that the signature is genuine and that the individual holds the designated title."

[21] *See, e.g.,* the Land Records FAQs for Ada County in Idaho, Ada County Assessor's Office, https://adacounty.id.gov/assessor/land-records/land-records-faq, (last visited Aug. 11, 2018).

[22] For general information on select community property states' laws on this topic, see:

- Alaska Stat. § 34.77.090.
- Arizona Stat. § 25-211.
- Cal. Probate Code § 100(a).
- Idaho Code § 15-6-201.
- Louisiana RS 9:2801.
- Nevada Rev. Stat. 123.225.
- New Mexico Stat. § 45-2-807.
- Tex. Probate Code § 112.051.
- Wash. Rev. Code § 26.16.120.
- Wis. Stat. § 766.58. (hereinafter "Community Property State Laws")

[23] Second Restatement of Conflicts of Laws, *supra* note 10, at § 259.

[24] *Id.* at § 223.

Advising the Undocumented Military Spouse

BY CAPTAIN AARON R. PETTY, USAF

A junior enlisted member makes a legal assistance appointment for himself and his wife regarding "immigration." You escort them back to your office and after explaining that your discussions are confidential, you learn the member was born in California and the member's wife entered the United States illegally at age nine, and has been living here ever since. The couple, who are both now 24, met in high school, and married a little over two years ago. The wife was previously granted deferred action under the Deferred Action for Childhood Arrivals ("DACA") program, but it is about to expire. They want to know whether they should renew it and whether they have other options.

> Some clients who have been navigating the immigration system on their own for years will have a better understanding of what types of relief are available than many attorneys.

Few first-assignment captains will have the expertise necessary to fully answer these concerns. Indeed, some clients who have been navigating the immigration system on their own for years will have a better understanding of what types of relief are available than many attorneys. Moreover, describing the immigration system as merely "complex"[1] is charitable.[2] Immigration law is as intricate as any highly regulated field such as securities, tax, or telecommunications;[3] changes in substance and enforcement priorities are relatively frequent, and the consequences can be life-changing.[4] Accordingly, it is exceedingly difficult for the occasional practitioner to remain abreast of every relevant development, and even more so for attorneys with limited experience in the field. There are, however, some steps legal assistance attorneys can take short of simply handing over a list of local immigration lawyers.

KNOW YOUR CLIENTS

First, make sure the member is a citizen because the ability to petition for immigration benefits for a family member is generally reserved to citizens.[5] For officers, citizenship is nearly always a requirement for obtaining a regular commission,[6] but enlistment by lawful permanent residents and, in some cases, noncitizens who lack even that status is permitted.[7] Often noncitizens who enlist will naturalize shortly after enlistment,[8] so except in rare cases, the member will be a citizen.

Determining the spouse's status may be more challenging. If, as in the example above, the spouse entered without inspection as a child, the spouse may have no documentation of their foreign citizenship or immigration status at all. In some cases, birth or baptismal records may be available. In many cases, the attorney will have to rely solely on the information provided by the client.

In those cases, it is important to inquire what steps, if any, have been taken with respect to the spouse's immigration status, and also what steps, if any, the government has taken against him or her. Has the spouse applied for asylum? DACA? Parole in place? Has U.S. Immigration and Customs

Enforcement issued a Notice to Appear in immigration court that initiates removal (i.e. deportation) proceedings? What is the current status of any applications or proceedings? Does the spouse have a criminal history?

To become a citizen on the basis of marriage to a U.S. citizen, one must first be a lawful permanent resident (i.e., a green card) for three years.

Let's assume there are no pending removal proceedings and the spouse has no prior convictions. A military spouse who entered the United States without authorization will likely have two objectives: first, avoiding removal and, second, obtaining some form of permanent lawful status, ideally U.S. citizenship. To become a citizen on the basis of marriage to a U.S. citizen, one must first be a lawful permanent resident for three years.[9] Lawful permanent residency (i.e., a "green card"), in turn, requires the applicant to be "admissible."[10]

The problem for the spouse in this scenario is that physically entering the United States without being inspected and admitted or paroled[11] by an immigration officer renders the spouse inadmissible.[12] The spouse would therefore be ineligible for lawful permanent residency. In addition, the spouse's presence in the United States without being admitted or paroled potentially subjects them to removal.[13]

PAROLE IN PLACE

The best solution to cure a lack of admission or parole is, not surprisingly, to be admitted or paroled; however this is not always a simple matter to accomplish. Historically, grants of admission or parole could only be done by leaving the United States and applying for an immigrant visa at an embassy or consulate abroad.[14] Furthermore, any alien who is physically in the United States for more than 180 days after having entered without inspection, and who applies for an admission (including adjustment of status) within three years of that unlawful presence, requires a discretionary waiver before they may be admitted again.[15] If the unlawful presence was more than a year, then a waiver is required to be admitted again within ten years of their unlawful presence.[16]

Historically, grants of admission or parole could only be done by leaving the United States and applying for an immigrant visa at an embassy or consulate abroad.

For military families, these requirements have proven especially onerous.[17] The need for a spouse to leave the country to regularize their status impacts readiness due to the spouse's time away from home, the expense of travel, and because the departure comes without an assurance of lawful return.[18]

To address these challenges, the Department of Homeland Security may grant a type of relief known as "parole in place" to the spouses of military members.[19] The phrase "in place" signifies that, although parole is typically granted to permit an arriving alien to physically enter the United States while admissibility is determined (e.g., for urgent humanitarian reasons), parole is granted to these individuals as already physically present in the United States.

For many military spouses who entered the United States without being admitted or paroled, parole in place will make them eligible for lawful permanent residency while simultaneously eliminating what may be the only legal basis for their removal. In addition, the U.S. Citizenship and Immigration Services (USCIS) has interpreted the three- and ten-year bars (and the necessity of an unlawful presence waiver) not to apply to recipients of parole in place who do not depart the country.[20] Thus, a grant of parole in place will enable a military spouse who unlawfully entered the United States to apply for adjustment of status based on their marriage to a U.S. citizen.

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To apply for parole in place, the spouse must complete a Form I-131, writing in "Military PIP" in Part 2 rather than checking a box, and submit it to the USCIS office with jurisdiction over either the spouse's place of residence or the member's duty station, along with evidence of the family relationship, sponsor's military service, two passport photographs, and (optionally) any other favorable evidence.[21] There is no fee for filing the application.

Once the spouse is granted parole in place, the military member may petition to classify the spouse as an "immediate relative" by submitting a Form I-130 to the USCIS.[22] Once the marital relationship is established, the spouse may apply for adjustment of status to lawful permanent resident (i.e., apply for a "green card") by submitting a Form I-485.[23] The I-130 and I-485 may also be submitted concurrently for faster processing.[24]

DEFERRED ACTION FOR CHILDHOOD ARRIVALS

Clients may also inquire about the DACA program.[25] As the name implies, this program offers "deferred action"—essentially an exercise of prosecutorial discretion not to initiate removal proceedings for a limited period of time—against removable aliens who meet specific additional criteria and merit a favorable exercise of discretion.[26] In September 2017, the U.S. Department of Homeland Security announced the DACA program would be wound-down,[27] but this has been preliminarily enjoined in multiple courts on a nationwide basis with respect to renewal applicants,[28] and one other court has entered a permanent injunction on a nationwide basis with respect to both renewal and initial applicants.[29]

If a client has already been granted parole in place or has an application for parole in place pending, then DACA likely provides no further benefits. DACA does not provide any sort of legal status and does not provide a path toward lawful permanent residency or citizenship, as parole in place does.[30] Moreover, once a spouse is granted parole in place, the spouse will no longer be removable for being present without admission or parole (and, assuming the spouse has no criminal history, will likely not be removable at all). Thus, once granted, there will no longer be any potential "action" to "defer."

CONCLUSION

Although both parole in place and DACA may offer the undocumented military spouse peace of mind, parole in place offers a path to permanent legal status, potentially including citizenship, and eliminates one of the most common legal bases for removal. Legal assistance attorneys should ensure clients fully understand the benefits and limitations of each type of relief, as well as the eligibility criteria for both.

ABOUT THE AUTHOR

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ENDNOTES

[1] Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

[2] Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003) (noting "the labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations…"); Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981) ("Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon."); Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) ("Congress…has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle."); Yuen Sang Low v. Att'y Gen., 479 F.2d 820, 821 (9th Cir. 1973) ("[W]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say."); Kevin R. Johnson, *Ten Guiding Principles For Truly Comprehensive Immigration Reform: A Blueprint*, 55 Wayne L. Rev. 1599, 1637 (2009) ("…the accretion of complex provisions upon complex provisions making the laws complex, obtuse, and, at times, unintelligible.").

[3] Elizabeth Hull, Without Justice for All 107 (1985) ("The immigration laws are second only to the Internal Revenue Code in complexity.").

[4] Joseph E. Mascaro & Robert W. Cassot, *Malpractice Risks in Immigration Law, in* New Developments in Immigration Enforcement and Compliance 106 (2011) ("Indeed, the changing nature of immigration law can make it more difficult than tax law, and therefore more challenging for the occasional practitioner.").

[5] Lawful permanent residents may also petition for certain family members, subject to numerical limitations. 8 U.S.C. §§ 1151 & 1153 (2017).

[6] 10 U.S.C. § 532 (2017); 32 C.F.R. § 66.6(b)(2)(ii) (2017).

[7] 10 U.S.C. § 504(b) (2017); 32 C.F.R. §66.6(b)(2)(i) (2017).

[8] 8 U.S.C. § 1440(a) (2017) (authorizing naturalization of noncitizens who serve honorably in the armed forces during period of armed conflict with a hostile foreign force); Exec. Order No. 13,269, 67 Fed. Reg. 45,287 (July 3, 2002) (declaring the "period of war against terrorists of global reach" to be a period of conflict with a hostile foreign force for purposes of Section 1440(a), retroactive to Sept. 11, 2001). Since October 2017, the Department of Defense has required 180 consecutive days on active duty, one year in the Selected Reserve, or one day of active duty in- or in direct support of- a combat zone (which qualifies the member for hostile fire or imminent danger pay) to certify a military member's service as honorable for purposes of expedited citizenship under 8 U.S.C. § 1440. *See* A. M. Kurta, Certification of Honorable Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces Purposes of Naturalization (Oct. 13, 2017), https://dod.defense.gov/Portals/1/Documents/pubs/Naturalization-Honorable-Service-Certification.pdf (last visited Sept. 6, 2018).

[9] 8 U.S.C. § 1430(a) (2017).

[10] 8 U.S.C. § 1255(a) (2017).

[11] "Admission" means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13) (2017). "Parole" is temporary lawful physical presence in the United States while seeking admission. *See* 8 U.S.C. § 1182(d)(5) (2017); 8 C.F.R. § 212.5 (2017).

[12] 8 U.S.C. § 1182(a)(6)(A)(i) (2017).

[13] 8 U.S.C. § 1229a(a)(2) (2017).

[14] Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50, 244, 50,244-45 (July 29, 2016) ("Individuals present in the United States without having been inspected and admitted or paroled are typically ineligible to adjust their status in the United States. To obtain LPR status, such individuals must leave the United States for immigrant visa processing at a U.S. Embassy or consulate abroad. But because these individuals are present in the United States without having been inspected and admitted or paroled, their departures may trigger a ground of inadmissibility based on the accrual of unlawful presence in the United States.").

[15] 8 U.S.C. § 1182(a)(9)(B)(i)(I) & (a)(9)(B)(v) (2017).

[16] 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2017).

[17] Margaret D. Stock, *Parole in Place for Military Families*, https://www.americanbar.org/content/dam/aba/events/legal_assistance_military_personnel/ls_lamp_cle_nov11_session3_parole_in_place.authcheckdam.pdf (last visited Sept. 6, 2018).

[18] U.S. Citizenship and Immigration Services, PM-602-0091 (2013).

[19] *Id.*

[20] *Id.*

[21] U.S. Citizenship and Immigration Services, *Discretionary Options for Military Members, Enlistees and Their Families*, https://www.uscis.gov/military/discretionary-options-military-members-enlistees-and-their-families (last visited Sept. 6, 2018), (hereinafter "*Discretionary Options for Military Members*").

[22] 8 C.F.R. § 204.2(a)(1) (2017); I-130, *Petition for Alien Relative*, https://www.uscis.gov/i-130 (last visited Sept. 6, 2018).

[23] 8 C.F.R. § 245.2(a) (2017); I-485, *Application to Register Permanent Residence or Adjust Status*, https://www.uscis.gov/i-485 (last visited Sept. 6, 2018).

[24] 8 C.F.R. § 245.2(a)(2)(i)(B)-(C) (2017); *Concurrent Filing of Form I-485*, https://www.uscis.gov/greencard/concurrent-filing-form-i-485 (last visited Sept. 6, 2018).

[25] *Remarks by the President on Immigration*, June 15, 2012, https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration (last visited Sept. 6, 2018); *Consideration of Deferred Action for Childhood Arrivals (DACA),* https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (last visited Sept. 6, 2018).

[26] *Discretionary Options for Military Members*, *supra* note 21.

[27] Elaine C. Duke, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sep. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca (last visited May 31, 2018).

[28] Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 436-38 (E.D.N.Y. 2018); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1048-49 (N.D. Cal. 2018).

[29] NAACP v. Trump, Nos. 17-cv-1907 & 17-cv-2325, 2018 WL 1920079, *24-*25 & *28 (D.D.C. Apr. 24, 2018). The decision is currently pending on appeal to the U.S. Court of Appeals for the D.C. Circuit. NAACP v. Trump, No. 18-5243 (D.C. Cir., filed Aug. 6, 2018).

[30] *Discretionary Options for Military Members, supra* note 21. DACA does, however, provide an opportunity to apply for work authorization. *Id.*

Understanding Environmental Remediation On An Air Force Installation

BY MAJOR MICHAEL SCHRAMA

Bases worldwide must field questions related to environmental remediation, an area of law that intersects environmental law, government procurement, and a host of policy considerations.

JAG attorneys provide a full spectrum of legal services to the U.S. Air Force and very often need to give guidance in a number of legal specialties. Specifically, bases worldwide must field questions related to environmental remediation, an area of law that intersects environmental law, government procurement, and a host of policy considerations. Why is environmental remediation so prevalent? Because Air Force bases have rich histories that predate legislation describing how hazardous substances should be handled and disposed; and the military mission inherently involves various substances, solvents, fuels and munitions, that make their way into the subsurface and groundwater. Environmental remediation is the removal of pollutants and contaminants from soil, groundwater, sediment, or surface water.[1]

The **Defense Environmental Response Program (DERP)** was established as a mechanism for the Department of Defense (DoD) to respond to the clean-up of hazardous substances associated with past DoD activities and is consistent with the provisions of the **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)**. CERCLA and policy considerations direct DoD taking response actions to the release of hazardous substances, pollutants, or contaminants from military installations that pose a risk to human health and the environment and can use appropriated funds to do so.[2] Under DERP, the DoD conducts cleanup at active installations, formerly used defense sites (FUDS), and base realignment and closure (BRAC) locations. After determining the site and actions needed, the individual military branch must procure a private contractor to undertake the actual remediation.

The government relies on private contractors to meet its extensive and challenging environmental remediation responsibilities.

The government relies on private contractors to meet its extensive and challenging environmental remediation responsibilities.[3] This reliance stems from the costly, time-consuming, and complex nature of environmental remediation, as well as the government's need for the scientific and technical expertise contractors can provide.[4] Additionally, because no two sites are the same, environmental remediation requires contracts be customizable to meet the needs of each individual remediation site.[5] As a result, environmental remediation projects have developed a character separate and distinct from all other government contracts.[6] The provisions in government contracts need to be well thought-out because they have the ability to allocate risk and ensure completion of the remediation projects.

A JAG at the base legal office should know that the Air Force has specially trained environmental and government procurement attorneys that choose the method of remediation and then make determinations for bid criteria and choosing the right contractor. Further, the Air Force has environmental and government contracting field support centers specifically designed to assist base legal office with substantive law questions. However, base attorneys should have a general understanding of the techniques used to deal with risk allocation in contract performance for environmental remediation. Specifically, how the Air Force uses certain types of contracts, certain specifications, and certain contract clauses to shift the performance burden. This article will examine each of these techniques, in turn.

The two types of contracts used in environmental remediation are fixed-price and cost-reimbursement.

CONTRACT TYPES

A contract type is the structure used in federal government contracts that signify the compensation agreements and responsibilities. The two types of contracts used in environmental remediation are fixed-price and cost-reimbursement.[7] In fixed-price contracts, the government and the government contractor agree, before any work is performed, that the government will pay the contractor a fixed fee or price for performance of the contract.[8] Fixed-price contracts bind the contractor to complete work at a fixed amount of compensation, once adjusted, regardless of the costs of performance.[9] This has the effect of placing the risk for performance costs upon the contractor.[10] If the contractors' actual costs are lower than the fixed price, they profit from the contract. If the actual costs are more, the contractor is accountable for the cost overrun.

With cost-reimbursement contracts, the government reimburses the contractor for allocable, allowable costs as they are incurred in performing the contract.[11] Cost reimbursement contracts are only used when circumstances do not allow fixed-price type contracts or uncertainties involved in contract performance do not permit costs to be estimated with accuracy.[12] A contractor fee is negotiated before work, which represents the profit the contractor will make on the contract.[13] Contractors pass their costs directly to the government and the contractor's profit is predetermined.[14] Any performance cost that is higher than expected or not contemplated by either party does not negatively impact the contractor's profit.

The cost-reimbursement contract fee and reimbursement scheme place the risk of the contract on the government. Fixed-price contracts are attractive to the government because of the government's ability to control the cost and divest itself of cost risk. There is a general preference for executive offices to use fixed-price contracting because of the preference to "minimize risk and maximize value for the taxpayer."[15] Fixed-price contracts are seen as the "best suited for achieving this goal because they provide the contractor with the greatest incentive for efficient and economical performance."[16] Fixed-price contracts are seen as providing "greater incen-

tive than cost-reimbursement contracts for the contractor to control costs and perform efficiently."[17]

> The strategy in environmental remediation should be to use the contract that will ensure project completion.

The strategy in environmental remediation should be to use the contract that will ensure project completion. Subjecting the contractor to an unreasonable amount of risk will only serve to drive up contract prices and run the risk that contractors walk-away from projects.[18] Fixed-price contracts are supposed to be used when "the risk involved is minimal or can be predicted with an acceptable degree of certainty."[19] However, if there are a considerable number of unknowns and unpredictable risks in a specific remediation, cost reimbursement may strike a fairer balance between contractor motivation and reasonable risk-taking. Although the government wants a fair price and cost control, the goal is the environmental remediation. Fixed-price contracts create more economic motivation to fulfill the contract; however, cost reimbursement contracts provide more stability and a higher probability of project completion.

CONTRACT SPECIFICATIONS

Generally, the government uses specifications in solicitations to communicate what it needs by setting forth objectives and standards. Specifications may include descriptions of the work to be done or drawings. For environmental remediation projects, two types of specifications are particularly important for the government: design and performance specifications.[20]

Design specifications "set forth in precise detail the materials to be employed and the manner in which the work [is] to be performed, and the contractor [is] not privileged to deviate therefrom, but [is] required to follow them as one would a road map."[21] In theory, design specifications are beneficial to the government in that they provide for budget management, quality control, a single source of accountability, and faster project completion.

Design specifications are conducive to tasks that can be clearly described and the government clearly understands the problem and solution—for example, finding a contractor to conduct a remediation (such as establishing a water treatment plant) or completing an environmental study. However, design specifications may not be appropriate where the government does not possess expertise in the field, or the work is particularly complex. Not having the requisite expertise is an issue because the government is liable for defective design specifications when it designates a particular type of design, method of performance, or particular process that is not feasible.[22]

> The extent of environmental remediation can be difficult to predict, which can impact performance specifications.

Performance specifications "specify the results to be obtained and leave it to the contractor to determine how to achieve those results."[23] The specifications attempt to describe the work in terms of what the end goal is supposed to be instead of delineating exactly how to perform the work. The contractor assumes almost all the risk when accepting the terms of the performance specifications. Further, performance specifications allow the contractors flexibility to seek the best avenue to accomplish work during performance, thereby benefiting both the contractor and the government.[24]

The extent of environmental remediation can be difficult to predict, which can impact performance specifications. Often times, making forecasts is not possible when a project is complex, long-term, and has many variables.[25] In these cases, the use of performance specifications often results in the government or the contractor receiving less than the benefit of the bargain. Ultimately, in negotiating an environmental remediation contract, the government should balance design and performance specifications based on the

extent of the remediation, the expertise of the government, and the availability of established practices.

CONTRACT CLAUSES

Most government contract terms are boilerplate contract clauses that are located in the Federal Acquisition Regulation (FAR). Unless the FAR authorizes a contract clause modification or omission, the standard terms apply. With regard to environmental remediation contracts in particular, the FAR provides general clauses mandating that contractors abide by applicable federal, state, and local hazardous materials laws,[26] as well as other specific clauses that shape whether the government or the contractor bears the risk in performance.

For example, any contract must include an environmental protection plan. The plan will include a combination of clauses in the contract to address matters such as Pollution Prevention,[27] Permits and Responsibilities,[28] and Protection of Existing Vegetation.[29] These clauses will require the contractor to contemplate potential environmental issues that need to be addressed during the project. The contractor will also need to develop a plan with detailed steps to avoid or minimize negative impacts on the environment during construction. Further, the contractor is responsible for obtaining any necessary licenses and permits, and for complying with any applicable laws.[30] The environmental plan and accompanied clauses provide a powerful risk-shifting mechanism that places both known and expected compliance costs on the contractor.

> One of the major risks in environmental remediation is the type of subsurface or other latent physical conditions that may be encountered.

"One of the major risks in environmental remediation is the type of subsurface or other latent physical conditions that may be encountered."[31] The major clause to deal with risk allocation of these conditions is the Differing Site Conditions clause.[32] "If bidders were required to assume the full risk of these conditions, they would either have to make extensive examinations and analyses of the site, or include contingencies in their bids to protect against potential unfavorable conditions."[33] The purpose of this clause is to take some of the gamble on subsurface conditions out of the bidding process. The contractor no longer needs to add a large contingency to every bid to cover the risk and the government benefits from more accurate bidding, without inflation for risk that may not occur.[34]

Another clause found in the FAR that is integral to proper risk allocation in remediation contracts is the Changes Clause. The Changes Clause gives the "government the unilateral right to order changes in contract work during the course of performance."[35] This clause provides the government flexibility to make changes to the contract to accommodate advances in technology or changes in the needs and requirements of the government.[36] Although contractors have no unilateral right to make any changes, they can propose work changes that the government may accept, which can make performance more efficient and improve the quality of the work.[37]

The Changes Clause also allows the government to order additional work within the general scope of the contract without having to go through the process of awarding a new contract.[38] Environmental remediation often deals with latent issues below the surface and the Changes Clause would allow the government to change the contract to meet demands. This clause allows the government to effectuate effective remediation. Further, if the government's policy shifts in the extent of remediation, the government could adjust the contract to meet the stated policy.

Moreover, as with all contracts, practitioners should keep in mind that complicated ventures are best accomplished when the parties develop common goals. Accordingly, practitioners should adopt the concept of "partnering in an effort to improve the working relationships of the contracting parties."[39] Although not an enforceable term of the contract, this concept fosters relationships between the various contractors and the government that promotes

achievement of mutually beneficial goals, including successful environmental remediation.

CONCLUSION

The expectations are not for base level attorneys to be substantive experts in the field of government procurement or environmental remediation. However, having a knowledge base allows the base attorney to have intelligent conversations with the various actors and understand the thought process behind decisions. Essentially, the Air Force can utilize the procurement process to institute risk-shifting measures and lay the groundwork for effective, timely, and comprehensive environmental remediation. As indicated above, the type of contract used, the specifications used, and the clauses used can all be chosen strategically in order to effectively strike a balance between contractor and government interests, while ensuring that ultimately the environmental remediation is completed in a timely manner.

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **Air Force Civil Engineer Center (AFCEC)**, https://www.afcec.af.mil/Home/Environment/
- **Air Force Response to PFOS and PFOA**, https://www.afcec.af.mil/WhatWeDo/Environment/Perfluorinated-Compounds/
- **Air Force PFOS/PFOA Snapshot (PDF)**, https://www.afcec.af.mil/Portals/17/documents/Environment/Emerging%20contaminants/PFOS-PFOA_Snapshot.pdf?ver=2019-08-28-155658-617
- **Air Force Protects Airmen, Environment with New Firefighting Foam**, https://www.afcec.af.mil/News/Article-Display/Article/1556282/swap-complete-af-protects-airmen-environment-with-new-firefighting-foam/
- **Air Force Working Toward Innovative Groundwater Cleanup Solution**, https://www.afcec.af.mil/News/Article-Display/Article/1498001/air-force-working-toward-innovative-groundwater-cleanup-solution/
- **EPA: Remediation Technologies for Cleaning Up Contaminated Sites**, https://www.epa.gov/remedytech/remediation-technologies-cleaning-contaminated-sites
- **Military Times: DoD: At Least 126 Bases Report Water Contaminants Linked to Cancer, Birth Defects**, https://www.militarytimes.com/news/your-military/2018/04/26/dod-126-bases-report-water-contaminants-harmful-to-infant-development-tied-to-cancers/
- **PFOA and PFOA (Video; 3:26)**, https://www.youtube.com/watch?v=GmnQWpgwhRY&feature=youtu.be

ENDNOTES

[1] La. Generating, L.L.C. v. Ill. Union Ins. Co., 832 F.3d 618, 625 n. 17 (2016).

[2] 10 USC § 2701; 42 USC § 9604; Executive Order 12580, Jan. 23 1987, as amended by Executive Order 13016, Aug. 28, 1996.

[3] John F. Seymour, *Liability of Government Contractors for Environmental Damage,* 21 Pub. Cont. L.J. 491, 495 (1992).

[4] Amy L. Momber, *Federal Environmental Remediation Contractual and Insurance-Based Risk Allocation Schemes: Are They Getting the Job Done?*, 58 A.F. L. Rev. 61, 63 (2006).

[5] *Id.*

[6] *Id.*

[7] In 1984, the Competition in Contracting Act (CICA) amended federal procurement laws to eliminate the statutory preference for negotiating competitive proposals if four conditions are met: (1) time permits sealed bidding; (2) price and price-related factors are the sole basis for the award; (3) discussions concerning bids are unnecessary; and (4) more than one bid is reasonably expected. *See* FAR 6.401; 10 U.S.C. § 2304(a)(2)(A). Because of the complexity of environmental remediation, discussions are necessary to ensure offerors understand compliance requirements. Further, because of the variable nature, cost is only one factor considered in determining the best offer. As a result, negotiated procurement is usually justifiable and preferable to sealed bidding.

[8] FAR 16.202-1.

[9] CIBINIC ET AL, Formation of Government Contracts, 1218 (4th ed. 2011).

[10] *Id.*

[11] FAR 16.301-1.

[12] FAR 16.301-2.

[13] Cibinic et al., *supra* note 7, at 1245.

[14] *Id.*

[15] Memorandum for the Heads of Executive Departments and Agencies - Subject: Government Contracting, Office of the Press Secretary (4 Mar. 2009), https://obamawhitehouse.archives.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-subject-government-contracting.

[16] *Id.*

[17] *Id.*

[18] FAR 16.103-16.104.

[19] FAR 16.103

[20] 41 U.S.C. § 253(a)(3) (2006); *see also* FAR 11.002(a)(2)(i).

[21] J.L. Simmons Co. v. United States, 412 F.2d 1360, 1362 (1969).

[22] *See* Leslie-Elliott Constructors, Inc., ASBCA 20507, 77-1 BCA ¶ 12,354 (government design of three-pipe sprinkler system was defective since it did not meet performance requirements); *see also* Drennon Constr. & Consulting, Inc. v. Dep't of Interior, CBCA 2391, 2013 BCA ¶ 35,213 (design of road that did not meet scenic river requirements).

[23] *Fireman's Fund Ins. Co. United States*, 92 Fed. Cl. 598, 652-53 (2010).

[24] Ralph C. Nash & John Cibinic, Postscript: Proposals and Promises 15, No. 1 Nash & Cibinic Rep. P 3 (2001).

[25] Momber, *supra* note 1, at 70.

[26] FAR 52.223-3(g).

[27] FAR 52.223-5.

[28] FAR 52.236-7.

[29] FAR 52.236-9.

[30] FAR 52.223-3(g), 52.236-7.

[31] John Cibinic, Jr. et al., Administration of Government Contracts 435 (5th ed. 2016).

[32] FAR 52.236-2

[33] Cibinic et al., *supra* note 28, at 435.

[34] The Differing Site Conditions clause offers relief only when there is a material difference between the conditions causing increased costs and the contractor is able to demonstrate that the conditions encountered differ materially from the known and the contractor could not have reasonably anticipated or discovered such conditions prior to bidding. See Charles T. Parker Constr. Co. v. United States, 433 F.2d 771, 778 (Ct. Cl. 1970); *Perini Corp. v. United States*, 381 F.2d 403 (Ct. Cl. 1967); *James E. McFadden, Inc.*, ASBCA 19921, 76-2 B.C.A. (CCH) ¶ 11,983 (1976). The clause reduces contractor risks by allowing an equitable adjustment any time the contractor encounters a differing site condition in one of two categories:

> (1) Subsurface or latent physical conditions at the site which differ materially from those indicated in the contract; or
>
> (2) Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided in the contract.

FAR 52.236-2(a). *See also Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987) (detailing what the contractor must prove to recover for Type I differing site conditions); *Appeal of Covco Hawaii Corp.*, ASBCA 26901, 83-2 B.C.A. (CCH) P 16,554 (1983) (detailing what the contractor must prove to recover for Type II differing site conditions).

[35] Cibinic et al., *supra* note 28, at 345.

[36] *Id.* at 346.

[37] *Id.*

[38] *Id.*

[39] Cibinic et al., *supra* note 28, at 9.

Can You Do That?

Recognizing Collateral Attacks on Military Sexual Assault Testimony through the Civil Discovery Rules in State Court

BY MAJOR DOUGLAS E. DEVORE II

This article provides situational awareness and sets forth considerations that JAGs should consider when analyzing a case that implicates multiple jurisdictions.

INTRODUCTION

Members of the Armed Forces enjoy many rights and privileges incident to military service. Some privileges are well known, while others are less so—even to those with great familiarity with the military. One such lesser-known privilege is the federal officer removal statute, **28 U.S.C. § 1442**. Though it is used infrequently and may be relatively unknown to Air Force Judge Advocates (JAGs), it is still important to understand its significance and effect. The following describes a specific case where the federal officer removal statute was implicated through the creative use by civilian counsel. This article provides situational awareness and sets forth considerations that JAGs should consider when analyzing a case that implicates multiple jurisdictions.

THE LAW

Before discussing this case, it is important to understand three additional laws and rules—first, the federal officer removal statute, second, the rules surrounding depositions, and third, a servicemember's duty to report criminal conduct. We will now examine each, in turn.

"Federal Officer" and Removal to Federal Court

The federal officer removal statute codified at 28 U.S.C. § 1442 gives federal court jurisdiction over *civil matters* directed at "[t]he United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such

office."[1] "Historically, removal under [Section 1442…] was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his [or her] official duties…. It also enables the defendant to have the validity of [his or] her immunity defense adjudicated, in a federal forum. For these reasons, [the United States Supreme] Court has held that the right of removal is absolute for conduct performed under color of federal office…."[2] A 2011 amendment to Section 1442(d)(1) expanded the definition of "civil action" to include "any proceeding."[3]

Depositions

Depositions are uncommon in military justice, and even the most experienced military justice practitioners may utilize them very infrequently across an entire career.[4] Therefore, this article will not discuss the applicability or use of depositions in courts-martial except to say that there are three principal authorities for using depositions in military law practice,[5] and "the primary purpose [for depositions in military law practice] is to preserve the testimony of unavailable witnesses for use at trial."[6]

In contrast, depositions occur frequently in civil cases.[7] The Federal Rules of Civil Procedure describe circumstances where they are appropriate,[8] and they specifically state that a deposition "may not be used as a substitute for discovery."[9] Most states have adopted the Federal Rules' limits on conducting pre-litigation discovery, [10] but a few jurisdictions have more expansive ones.[11] Texas is a jurisdiction with a broad discovery standard. Codified as Texas Rule of Civil Procedure 202, Texas authorizes "a pre-suit deposition either to perpetuate testimony in an anticipated case or to *investigate a potential claim*."[12] In Texas, a party may seek court-authorized depositions for either evidence preservation or evidence *development* purposes.

Affirmative Duty to Report Criminal Conduct

The final consideration is a military member's obligation to report criminal conduct. The Navy imposes an affirmative duty to report criminal offenses on its members.[13] By policy, "the Army has imposed on commanders, leaders, and other personnel under special circumstances, regulatory duties to report crimes."[14] The Air Force has gone about half-way, requiring *some* people to report *sexual assaults*.[15] Military courts have also upheld convictions of service members who failed to report other offenses with which they were not personally involved.[16]

With these laws and rules as a background, we now turn to the aforementioned case.

THE CASE

Background Facts

Given recent changes to the UCMJ, it is important to note that the events surrounding this case first occurred in summer 2014. That summer, two students who were assigned to the Department of Defense's Medical Education and Training Campus on Joint Base San Antonio-Fort Sam Houston joined their friends for an evening of partying at area bars. They later moved to an off-base hotel where the partying continued. Throughout the evening and early morning, they consumed a large quantity of alcohol. Eventually, the two students had sex. The male student contended that the sex was consensual based on their flirting and kissing. The female student disagreed and stated she was sexually assaulted. The female student did not initially report the alleged assault to military authorities. She shared details of the incident with a friend from her training class. The friend immediately reported the allegations, and local civilian law enforcement started an investigation. Contemporaneous with the start of the investigation, the female student also completed a sexual assault forensic examination at an area hospital.

Civilian law enforcement interviewed several witnesses, including the female student, and collected evidence. The case was later turned over to military criminal investigators. The male student was removed from his class and did not complete training with his peers. In contrast, the female student finished her training and eventually moved on to her first assignment. After completion of the investigation, charges were preferred against the male student and an Article 32 hearing was held in late 2015 or early 2016, and charges were referred to trial in 2016.

Request for Deposition in Order to "Interview" Complaining Witness

The exact timing is unclear from the civil record, but at some point prior to trial, the male student tried to reach out to the female student. It is likewise unclear if he tried to contact her through counsel. He stated that, "[l]eading up to the pretrial investigation, [he] made multiple requests to interview [the complaining witness.]" He sought "an *informal* interview" with the female student, asking "that [the female student] be present at the pretrial investigation to offer a statement." This did not happen. As a result, the male student went to state court to obtain permission under Rule 202 of the Texas Rules of Civil Procedure (Texas Rule 202) to "interview" the female student. Texas Rule 202 is used to preserve or develop evidence that may be needed later at trial. [17] As a practical effect, Texas Rule 202 could be employed as an intimidation or harassment technique because there is no requirement for a case to proceed beyond the evidence-development stage.

The male student filed a request under Texas Rule 202 to depose the female student. [18] The male student sought three objectives in his request, including that he wanted to: (1) gain insight into the facts underlying her claims, including the female student's alleged level of intoxication and biases or motives; (2) assess the strengths and weaknesses of his criminal case; and (3) gauge potential causes of action for a Texas state court civil suit. The court granted on an *ex parte* basis and allowed the deposition to proceed.

Once the court granted the request, the male student served it on the female student. It is important to note that while the female student's home of record was Texas, she was not there. She had already moved to her first duty station outside of Texas. Nonetheless, the male student knew her home address, served her there, and proceeded under *civil*, not *criminal*, discovery rules. Had the male student proceeded under criminal rules, it is likely a no-contact order would have been in place, effectively barring the male student from contact with her. Since the male student operated under the civil rules, there was no record of a no-contact order to prevent him from pursuing his course of action.

Removal of Case from State Court to Federal Court

It is unclear whether the female student or someone else actually received the notice for deposition. What is clear is that shortly after the request was granted by the Texas court, a JAG contacted the U.S. Attorney's Office. After seeking and obtaining representation authorization from the Constitutional Torts Branch of the Department of Justice,[19] the U.S. Attorney's Office immediately filed a Notice of Removal to have the case moved from state court to federal court as authorized by the federal officer removal statute.

As would be expected, the male student opposed this action. He argued that federal removal officer statute should be narrowly construed. He also argued that a Texas Rule 202 petition is not a "civil action" upon which relief can be granted and thus fell outside of the federal officer removal statute. Further, he asserted that no actual offense occurred under the applicable service regulation, arguing his belief that since the sex was consensual, no UCMJ violation occurred and no report was required. In the alternative, he argued that even if an offense had occurred, the female student was in violation of military regulations, because she failed to report the offense to *military* authorities by self-admitting to a *civilian* hospital under the care of *civilian* medical providers.

Unsurprisingly, the U.S. Attorney opposed the male student's assertions. First, the U.S. Attorney argued the broad applicability of the removal statute itself, stating the purpose of the "federal officer removal statute is to provide a neutral forum in which federal officers could present their defenses" for actions taken in an official capacity.[20] Second, the U.S. Attorney argued that a Texas Rule 202 action was a "civil action" because a 2011 amendment specifically broadened the definition of "civil action" to include petitions under Texas Rule 202.[21]

Third, the U.S. Attorney argued that the female student had properly turned to military authorities when she reported the

assault. The U.S. Attorney further noted at the time the Texas Rule 202 action was filed the *military* was prosecuting the male student, and not the State of Texas. This was prima facie evidence that the female student had reported the incident to *military* authorities in accordance with the applicable guidance. The U.S. Attorney also highlighted that the female student submitted to a forensic examination at a civilian hospital, but only *after* she had gone to a *military* one, and was told the military lacked the capability to perform the procedure. Moreover, the female student's assault occurred "incident to service," and federal courts have stated a "service member is injured 'incident to service' if the injury is because of [a] military relationship with the Government."[22] The unique character of the military makes it "'a specialized society separate from civilian society' with 'laws and traditions of its own [developed] during its long history.'"[23]

THE OUTCOME

Military authorities completed their investigation and charged the male student with sexual assault in the fall of 2015.

Disposition

In the fall of 2016, the case proceeded to trial by court-martial. The male student, as accused, was convicted of sexual assault. He received, among other punishments, confinement and a punitive discharge.

The civil case was decided shortly after the court-martial finished. Rather than dismissing the case as moot, the federal court considered the male student's arguments. First, the court considered the removability of the case under the federal officer removal statute. It rejected the male student's argument that the matter was not a "civil action" for purposes of removal and determined that the attempt to depose a federal officer pre-suit is removable. It then considered whether the female student acted beyond the scope of her employment because she confided in a friend instead of reporting her assault to the chain of command. The court determined she acted properly within the scope of the rules and that a factual basis exists for the civil case to be removed to federal court. [24] Based upon these findings, the court denied the male student's motion to remand and dismissed the case with prejudice.

Lessons Learned

A few lessons can be drawn from this case which are useful for military practitioners, and these lessons apply to Air Force JAGs representing the government, the defense, and victims.

FIRST, there may be several courts involved in a case beyond those that deal with criminal law. In the above case, the underlying sexual assault occurred at an off-base hotel with civilian authorities involved during the initial investigation. As such, non-federal (i.e., state) courts had jurisdiction over any non-federal claims that may have arisen during the incident. Although this particular case involved a criminal investigation and action under the UCMJ, understanding local rules may have benefits in other areas such as legal assistance. For example, Reserve and Guard lawyers with local jurisdictional expertise can be a valuable resource for active-duty practitioners on local rules and practices.

SECOND, there is tension between civil and criminal discovery rules which military justice practitioners rarely face. In general, criminal discovery rules are narrower than civil discovery,[25] and civil discovery rules cannot be used to obtain information otherwise unobtainable in a criminal case.[26] This distinction is not merely academic, because as seen in this case, the male student tried to use civil discovery rules to initiate contact with the female victim that was otherwise prohibited. Had he been successful, the male student could have intimidated the female student into not assisting in the investigation and prosecution of the criminal case that ultimately resulted in his conviction.

THIRD, JAGs should act aggressively to protect the rights of their clients as well as to preserve testimony that may be needed in prosecuting military courts-martial. The federal officer removal statute may be a tool to shield military victims from such behavior noted above, intended to intimidate and dissuade them from participating in investigating and prosecuting serious crimes.[27] Further, a more difficult case is presented when a civilian victim is involved who has no obvious connection

to federal service. [28] In such instances, it may be necessary to first obtain immunity from the Attorney General under 18 U.S.C. § 6004 for civilian witnesses to shield them from this sort of attack.

CONCLUSION

In the case described, the serendipitous confluence of three events led to the successful application of the federal officer removal statute: (1) a U.S. Attorney's Office who was familiar with the rule; (2) a JAG who reached out to the U.S. Attorney when assisting a military member; and (3) a relatively straightforward fact pattern. A basic understanding of the federal officer removal statute equips military justice practitioners with another tool to assist in the investigation and prosecution of serious crimes that overlap multiple jurisdictions.

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **American Bar Association:** Your At-A-Glance Tool for Information on Depositions and Witnesses (April 15 2019), https://www.americanbar.org/groups/litigation/resources/evidence/
- **The Federal Lawyer:** Federal Officer Removal: The Misunderstood Removal Statute (May 2013), https://www.perkinscoie.com/images/content/2/9/v2/29047/05-2013-federal-lawyer.pdf.pdf

ENDNOTES

[1] 28 U.S.C. § 1442 (a)(1) (2016) emphasis added.

[2] Arizona v. Manypenny, 451 U.S. 232, 241–42 (1981) (internal citations omitted). Four elements must be satisfied for a state case to be successfully removed to federal court under this statute: "(1) [T]he defendant [must be] a person; (2) . . . the federal government or federal officer directed the defendant to take action; (3) . . . the action was the causal nexus of the plaintiff's claim; and (4) . . . a colorable federal defense exists as to the claim." Andrew E. Shipley and John F. Henault, *Federal Officer Removal: The Misunderstood Removal Statute*, Fed. Law., May 2013, at 72 (citing Mesa v. California, 489 U.S. 121 (1989)).

[3] Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(a)(1)(C), 125 Stat. 545 (2011).

[4] For a more comprehensive discussion of use of depositions in military law practice, *see* Colonel Mark L. Allred, *Depositions and a Case Called* Savard, 63 A.F. L. Rev. 1 (2009).

[5] These three authorities are: Article 49, MRE 804, and RCM 702. Article 49 authorizes depositions in courts-martial "so far as otherwise admissible under the rules of evidence." MRE 804 applies in cases where a witness is unavailable and is the rule referred to by Article 49. RCM 702 provides the mechanism for depositions to be used in military trial practice.

[6] Manual for Courts-Martial, United States [hereinafter MCM], app. 21, at A21-33 (2016) (Discussion of RCM 702).

[7] Fed. R. Civ. P. 27.

[8] Penn. Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1374 (D.C. Cir. 1995) (a proponent must show he or she is acting in anticipation of litigation, he or she has an interest in the potential litigation, the facts which the proponent desires to establish through the deposition, the identity of the individuals to be deposed, and the anticipated testimony expected from each witness).

[9] *Id.* at 1376.

[10] *Id.* at 235–36.

[11] *Id.* at 236–38.

[12] *Id.* at 242 (emphasis added).

[13] U.S. Dep't of Navy, U.S. Navy Regulations, 1990, art. 1137 (Sept. 14, 1990): "Persons in the naval service shall report as soon as possible to *superior* authority all offenses under the Uniform Code of Military Justice which come under their observation, except when such persons are themselves already criminally involved in such offenses at the time such offenses first come under their observation." (Emphasis added.) In *United States v. Serianne*, the Navy-Marine Corps Court of Criminal Appeals addressed the self-incrimination aspect of this regulation, but ultimately upheld the validity of this requirement. *See* United States v. Serianne, 68 M.J. 580 (N-M. Ct. Crim. App. 2009), *aff'd* 69 M.J. 8 (2010). For an excellent discussion and analysis of this case, *see* Lieutenants Randall Leonard and Joseph Toth, *Failure to Report: The Right Against Self-Incrimination and the Navy's Treatment of Civilian Arrests After* United States v. Serianne, 213 Mil. L. Rev. 1 (2012).

[14] U.S. Dep't of Army, Reg. 600-20, Army Command Policy (Nov. 6, 2014). Army policy on this matter states: "[E]nsuring the proper conduct of soldiers is a function of command. Commanders and leaders in the Army, whether on or off duty or in a leave status, will…[t]ake action consistent with Army regulations *in any case* where a soldier's conduct violates good order and military discipline." *Id.* at ¶4-4a (emphasis added).

[15] U.S. Dep't of Air Force, Instr. 90-6001, Sexual Assault Prevention and Response (SAPR) Program, ¶3.7.3 (May 21, 2015, incorporating Change 1, dated Mar. 18, 2016): "Any military member or civilian employee, other than those authorized to receive confidential communications or otherwise exempted by operation of law, regulation, or policy, who receives a report of an adult sexual assault incident involving a subordinate in the individual's supervisory chain *will report* the matter to the SARC, Commander (or equivalent) and AFOSI." (Emphasis added.) *But see* ¶3.7.4, which states military members not in the supervisory chain "are strongly encouraged, but not required to report" sexual assaults. *See also* U.S. Dep't of Air Force, Instr. 1-1, Air Force Standards, ¶2.3 (Aug. 7, 2012, incorporating Change 1, dated Nov. 12, 2014), imposes the ethics requirements of the Executive Branch upon members of the Air Force, which also includes mandatory disclosures of misconduct. However, the introduction states "[t]his instruction is directive in nature and *failure to adhere to the standards set out in this instruction can form the basis for adverse action under the Uniform Code of Military Justice*. An example would be a dereliction of duty offense under Article 92" (emphasis added).

[16] United States v. Heyward, 22 M.J. 35, 36–37 (C.M.A. 1986) (holding it "entirely reasonable for the Air Force to impose upon its members a special duty to report drug abuse . . . . in attempting to maintain high standards of health, morale, and fitness for duty"); *see also* United States v. Medley, 33 M.J. 75, 77 (C.M.A.1991) (holding "a person in a position of military leadership" may be prosecuted for "consciously ignor[ing] the blatant criminal conduct of subordinates," because the "duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility").

[17] Texas Rule of Civil Procedure 202 (Texas Rule 202) is more expansive than Federal Rule of Civil Procedure 27 (Federal Rule 27). *See* Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. Mich. J.L. Reform 217, 236–38 (2007). Federal Rule 27 limits the scope of authority given to private litigants to conduct pre-litigation discovery (as discussed below), while Texas Rule 202 states "a presuit deposition [may be taken] either to perpetuate testimony in an anticipated case or to *investigate a potential* claim." *Id.* at 242 (emphasis added). In other words, a party may seek court-authorized depositions for either evidence preservation purposes or evidence *development* purposes. There is no requirement that a case actually proceed beyond the evidence development stage.

[18] To understand the significance of the male student's attempt to depose the female victim under Texas Rule 202, it is important to understand how this rule differs from Federal Rule 27, which authorizes depositions in civil cases. To depose a witness under Federal Rule 27, a proponent must show he or she is acting in anticipation of litigation, he or she has an interest in the potential litigation, the facts which the proponent desires to establish through the deposition, the identity of the individuals to be deposed, and the anticipated testimony expected from each witness. *See* Penn. Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1374 (D.C. Cir. 1995). In addition, Federal Rule 27 states that a deposition "may not be used as a substitute for discovery." *Id.* at 1376. Most courts and commentators have construed Federal Rule 27 as limiting the "scope of authority given to private litigants to conduct [pre-litigation] discovery." *See* Hoffman, *supra* note 17 at 226.

Most states have specifically adopted Federal Rule 27's limits on conducting pre-litigation discovery. *Id.* n.65 at 235 (identifying the states of Hawaii, Idaho, Maine, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Mexico, South Carolina, Utah, Washington, and West Virginia who adopted Federal Rule 27's limitations). Other states have adopted rules where the language differs from the Federal rule but has been narrowly construed in court. *Id.* n.70 at 236 (identifying Alaska, California, Colorado, Illinois, Indiana, Iowa, Kentucky, Louisiana, and Maryland). In contrast, other states have broader discovery

rules, including New York, *id*. n.71 at 237, Florida, *id.* n.77 at 239, but these states do not limit as expansive discovery as is authorized in Texas. Only Alabama has discovery rules that appear as broad as those in Texas, *see id*. at 240–41, but Alabama differs in the important respect of "clearly preclude[ing] the taking of an oral deposition that is not coincident with the production of documents to investigate claims before suit." *Id*. at 241. Therefore, Texas stands alone in the breadth and scope of pre-suit discovery that is authorized in civil matters.

[19] *See* 28 C.F.R. §§ 50.15–50.16.

[20] The U.S. Attorney cited precedent that "the right of removal is absolute for conduct performed under color of federal office,… and the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of [the removal statute].'" *See* Manypenny, *supra* note 22 at 242, (citing Willingham v. Morgan, 395 U.S. 402, 407 (1969)).

[21] Removal Clarification Act of 2011, *supra* note 23. All case law cited by the male student pre-dated the 2011 amendment and are expressly superseded. The U.S. Attorney also cited *Advanced Orthopedic Designs v. Shinseki*, a case from the Western District of Texas which specifically rejected an argument that a petition for pre-suit discovery from the Unites States Department of Veterans Affairs under Rule 202 is not removable. *See* 886 F. Supp. 2d 546, 549 (W.D. Tex. 2012).

[22] Dickson v. Wojcik, 22 F. Supp. 3d 830 (W.D. Mich. 2014) (citing United States v. Johnson, 481 U.S. 681, 689 (1987)).

[23] Parker v. Levy, 417 U.S. 733, 743 (1974).

[24] In addition to analyzing Section 1442, which was the basis for the U.S. Attorney's action, the court also analyzed Section 1442a, which specifically applies to members of the armed forces. The court reached the same conclusion with regard to both statutes.

[25] Comment, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1052 (1961):

> First, there [is] a fear that broad disclosure of the essentials of a prosecution's case would result in perjury and manufactured evidence. Second,…revealing the identity of confidential government informants would create the opportunity for intimidation of prospective witness and would discourage the giving of information to the government. [Third,] since the self-incrimination privilege would effectively block any attempts to discover from the defendant, [the defendant] would retain the opportunity to surprise the prosecution whereas the state would be unable to obtain additional facts. This procedural advantage over the prosecution is thought to be undesirable in light of the defendant's existing advantages.

[26] In the seminal case on this issue, *Campbell v. Eastland*, the Fifth Circuit Court of Appeals expressly stated: "A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal trial." 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). This case is not controlling in military courts-martial, but the principle may be persuasive to military trial and appellate judges.

[27] Under RCM 405(i)(2)(a), "[t]he victim of an offense under the UCMJ has the right…to be reasonably protected from the accused," which arguably includes being contacted by the accused. In a situation where a military accused vehemently asserts innocence against a sexual assault allegation by a civilian victim, it is not hard to imagine the accused seeking permission to depose the civilian victim as authorized by local court rules. Notwithstanding the right described above in RCM 405(i)(2)(a), this rule pertains to pretrial hearings under Article 32, UCMJ, and is inapplicable until preferral of charges. Thus situation of a military accused and a non-military victim likely results in a "race to the courthouse" between the prosecution to promptly prefer charges and the defense to depose the accuser.

[28] In the case described by this article, the victim was an active-duty service member who qualified for protection under the federal officer removal statute. It is unclear how a case would be handled where a military accused tried to use civil discovery rules against a civilian victim, because the victim would not have an obvious federal privilege that could be asserted. Since a civilian victim has no obvious connection that would permit them to assert a claim, it is likely that some other action would be needed if a military accused tried to use civil discovery rules to "question" a civilian victim.

Autonomous Weapons Need Autonomous Lawyers

BY COLONEL WALTER "FRANK" COPPERSMITH

With the arrival of autonomous weapons systems (AWS)[1] on the 21st century battlefield, the nature of warfare is poised for dramatic change.[2] Overseen by artificial intelligence (AI), fueled by terabytes of data and operating at lightning-fast speed, AWS will be the decisive feature of future military conflicts.[3] Nonetheless, under the American way of war, AWS will operate within existing legal and policy guidelines that establish conditions and criteria for the application of force.[4] Even as the Department of Defense (DoD) places limitations on when and how AWS may take action,[5] the pace of new conflicts and adoption of AWS by peer competitors will ultimately push military leaders to empower AI-enabled weapons to make decisions with less and less human input.[6] As such, timely, accurate, and context-specific legal advice during the planning and operation of AWS missions will be essential. In the face of digital-decision-making, mere human legal advisors will be challenged to keep up!

Timely adoption of AI inside today's U.S. Air Force legal practice will be essential for attorneys trying to keep pace with clients and organizations now operating at Internet speed and cloud computing scale.

Fortunately, at the same time that AI is changing warfare, the practice of law is undergoing a similar AI-driven transformation.[7] Traditional legal practice as characterized by rote document drafting and review is becoming obsolete[8] while AI is creating entirely **new categories of legal work**[9] and giving lawyers powerful tools with which to address previously intractable legal issues.[10] As the arrival of AWS demonstrates, timely adoption of AI inside today's U.S. Air Force legal practice will be essential for attorneys trying to keep pace with clients and organizations now operating at Internet speed and cloud computing scale. While the law will remain, at least for now, a fundamentally human endeavor, the JAG Corps will soon be operating in a world where its clients and fellow lawyers are influenced, enabled, or entirely operated by AI.

This article will address the AI-driven challenges and opportunities facing legal practitioners in the US Air Force and propose ways in which they can adapt to satisfy the needs of AI-enabled clients pursuing AI-executed missions. The article encourages the JAG Corps to actively embrace AI today, capturing a first-mover advantage in developing a warfighter-supportive legal AI suitable for adoption and integration by clients developing or operating AWS. Finally, the article also recommends the JAG Corps initiate a series of projects in AI across the breadth of current legal service delivery to stay relevant to clients in the AI era.

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THE PACE OF INNOVATION

Legal practitioners busy "fighting fires" on behalf of senior Air Force leadership will be forgiven for not grasping the magnitude of the technology-driven change all around us. As a starting point, we should look at some key numbers about today's technology. Since its public debut in 1991, the **Internet**, which connects just about everyone to everything, has grown to more than 3.9 billion users[11] and is available twenty-four hours a day via personal devices, including over **7 billion mobile phones**.[12] The **microprocessors** that power this technology have increased in speed and power over 4 million times in 40 years.[13] But it's not just the technology; it's what humans are doing with it. Every twenty-four hours, humanity creates enough new information to fill the equivalent of 685 billion copies of all seven of the Harry Potter books—that's more information in a day than humanity created from the dawn of civilization until 2003.[14] The pace isn't slowing. By 2020, the average desktop computer will have roughly the same processing power as the human brain; by 2050, the same computer will have more processing power than all of humanity combined.[15] As such, it should come as no surprise that in a few years our lives—and our military conflicts—will be dominated by systems, processes, and experiences that haven't even been invented yet. Is it any wonder then that the practice of law is changing, and that such change will be dramatic and irreversible?

By 2020, the average desktop computer will have roughly the same processing power as the human brain; by 2050, the same computer will have more processing power than all of humanity combined...

ARTIFICIAL INTELLIGENCE

Now into this technological mix we add recent developments in AI that put human civilization at the first step on the road to the next industrial revolution,[16] an event that will see untold millions of blue- and white-collar jobs replaced by thinking machines while simultaneously creating new disciplines, products, and in-demand skills.[17] To clear up a common misconception, AI is not about building machines that work exactly like the human brain; in fact, such an outcome would be highly limiting and would sacrifice the huge advantages in speed, data storage, and rapid learning that machines have over humans.[18] Rather, AI is about machines and software performing tasks that normally require human intelligence, cognition, or mental flexibility, at microprocessor speed.[19] Understanding this, it's easy to see that AI is already all around us. From Netflix recommending a television show to active fraud defenses inside banking applications that turn off a stolen debit card merely by detecting an unexpected usage pattern, software is already learning about us and the world, influencing our decisions, or even making them on our behalf.

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AI is not a single technology; rather, AI is a basket of related and inter-connected functionalities that work together to supply "human-like" responses and reasoning.[20] Referred to as "cognitive technologies," AI comprises the functions of *deep learning, natural language processing, machine vision*, *speech recognition*, and *expert systems*.[21] Among these, deep learning is the most transformative and is the core of what is considered modern AI. **Deep learning** is a method for software to learn by trial and error at a pace limited only by computer processing power and cloud storage (both effectively boundless and increasing).[22] Using unstructured data (80% of all the data that exists is unstructured)[23] and

operating without the need for explicit, step-by-step instructions, deep learning systems iteratively generate solutions, cull the weakest of the outputs, and repeat.[24] Ultimately, the outcome from millions of deep-learning iterations is a digital neural network similar to how humans think, which establishes patterns, relationships, and connections within otherwise unstructured data.[25]

One of the best examples of how powerful deep learning has become is **AlphaGo**, a deep-learning AI built by Google to play Go, a game of strategy long thought impossible for automation to tackle. Nonetheless, Google's AlphaGo defeated the world's Go champion, not by being taught how to play and win (as a chess bot might have done a decade ago), but by playing untold millions of games and deducing which strategies worked and which did not.[26] Incredibly, AlphaGo used unexpected moves developed through iteration and brute-force computation that the professional player had never seen. While this method of problem-solving may seem inelegant, the combination of ubiquitous Internet access combined with near-infinite cloud storage and computer processing capability available at minimal cost, makes deep learning an effective way to address problems not readily solved by deduction.

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All of this AI reasoning capability would be useless without the concomitant ability to observe and understand the world in real time. Natural-language processing, machine vision, and speech recognition are the sensors AI uses for ingesting and comprehending information from the same analog sources humans use: eyes and ears.[27] Improvements in speech recognition have brought to life the computer from Star Trek in the form of virtual digital assistants such as Siri (Apple), Cortana (Microsoft), and Echo (Amazon) who can understand spoken instructions with an error rate better than a human-staffed call center.[28] Machine vision, which allows computers to recognize the objects in a photo, film or optical sensor, has unlocked the science-fiction-like ability of cars to drive themselves.[29] Natural language processing allowed IBM's Watson to defeat the world's greatest "Jeopardy!" champions, mastering not only simple sentences but also exceptionally complex word riddles.[30] Watson's second trick, reading and comprehending 70,000 oncology papers and providing medical diagnosis with an accuracy on par with experienced cancer physicians, seems almost simple by comparison.[31]The last component of our basket of AI is the expert systems that represent some of the first AIs constructed to model human expertise. Designed to ingest structured information, often via Q&A, expert systems apply rules-based decision-making to a set of facts, returning sophisticated analysis or document construction.[32] Of all AI, these are the most familiar to Air Force legal counsel, as products such as *DL Wills*[33] and *Turbo Tax*[34] are popular examples. Such systems are also some of the most useful for lawyers and those seeking legal help due to their specific focus and transparent nature. *Legal Zoom* has used hundreds of related expert systems to serve the needs of over two million clients, building the biggest brand in law services.[35]

AI AND TODAY'S PRACTICE OF LAW

For years, lawyers have enjoyed a de facto monopoly on legal information and activities by locking up knowledge, expertise, and intelligence in lawyers' brains and in hard-to-access data stores (law libraries).[36] The now-dominant version of lawyering is face-to-face and consultative: a bespoke practice, built on hand-crafted solutions driven by individual creativity and service.[37] It's an experience played out daily across the JAG Corps, via situations as varied as meeting with legal assistance clients, drafting civil law opinions, administering military justice, and providing advice and guidance to commanders and first sergeants.

Legal research, contract drafting, and document review, the routine work that makes up the bulk of the practice of law (especially the work done by junior attorneys), is on track to be entirely replaced by AI-enabled systems.

The AI-enabled legal office of tomorrow will be different. Legal research, contract drafting, and document review, the routine work that makes up the bulk of the practice of law (especially the work done by junior attorneys), is on track to be entirely replaced by AI-enabled systems.[38] Lawyers won't perform the daily blocking and tackling of legal work, but will rely instead on the legal version of an automatic pilot to address these important, but rudimentary and boring tasks.[39]Lawyers will instead be responsible for making sure the AI (potentially one of a suite of specialized capabilities) has received the appropriate training (or validation), has access to data of sufficient quality and quantity, and is subject to appropriate monitoring and confirmation.[40] The impact on the practice of law from the arrival of AI is stark. In 2016, experts predicted that in five years anywhere from 20 to 50% of all legal work would be fully replaced by AI.[41] In December 2017, a report from the Consultancy Group McKinsey states that 22% of a lawyer's job and 35% of law clerk's job can be automated.[42]

While there will be an investment in time in teaching the AI, not only will such effort be less work than obtaining a law degree, but once it's trained the AI can scale effortlessly to handle multiple issues and clients simultaneously.

Lawyers are familiar with many now commonplace technologies that have improved the efficiency and quality of legal work. WebFLITE[43], Westlaw[44], and Lexis-Nexis Advance[45] are just a few examples. However, none has the potential to disrupt the way lawyers do business as much as AI. Consider the case of specialized software using deep learning to extract topic-relevant information from unstructured data, delivering it in a particular, easy-to-use format, and then using that information to guide decisions or to take a particular action.[46] If that sounds familiar to legal practitioners, that's because AI can be described as "thinking like a lawyer"—a skill that law students develop via the case method. Except that in this example it is software—and not lawyers—that will identify the relevant facts, define the issues, derive the rules, and then counsel a client on a decision. While there will be an investment in time in teaching the AI, not only will such effort be less work than obtaining a law degree, but once it's trained the AI can scale effortlessly to handle multiple issues and clients simultaneously.[47]

AI will also let attorneys perform tasks that weren't possible or even imaginable a few years before.[48] AI will create a new "normal" of practicing law by: predicting case outcomes with statistically significant accuracy based on data and not just on intuition[49]; conducting document and evidentiary review in seconds instead of weeks[50]; performing digital conflict resolution without a mediator or judge[51]; and making sense of unfathomably large data sets to spot risks to the organization in a proposed course of action.[52]

Examples of these technologies are already in the field, giving a huge advantage to the early adopters. ***LONald***, a robotic contract attorney, conducts automated research into land registry records, identifying key information across voluminous unstructured data spread throughout multiple government databases.[53] The same research and analysis used to identify discrepancies with pending real estate deals that once took a team of associates two weeks is now completed in about two seconds.[54] Further, as senior attorneys evaluate *LONald's* output, they are able to further refine the algorithm powering the AI, meaning that *LONald* gets smarter in direct correlation to the amount of data it processes: a huge first-mover advantage.[55]

Kira Systems' **AI** undertakes mergers and acquisition due diligence, focused specifically on identifying and analyzing company documents.[56] The law firm of Clifford Chance saw the value early and created a special version of the software using their unique and in-demand expertise: in effect, distilling lawyer savvy into a digital product and taking it to speed and scale via AI.[57] It's not merely AI; it's an *AI by Clifford Chance*.[58]

Clients directly benefit by access to AI-enabled legal self-help.

Clients directly benefit by access to AI-enabled legal self-help. ***DoNotPay*** in the United Kingdom is a free to access chat bot (a program which carries out a simulated conversation with human users) which has successfully fought over 200,000 parking tickets.[59] Clients who couldn't or wouldn't spend the time or money to get legal help for a parking ticket can instead communicate with an AI-lawyer who will in turn generate a customized appeal suitable for submission to the appropriate governmental authority.[60]

The most ambitious effort to date is ***ROSS,*** a virtual attorney powered by IBM's Watson cognitive engine.[61] Used by law firms as a *professional support lawyer*, *ROSS* ingests natural language questions from senior counsel, then uses algorithms developed via deep learning to sift through the law and legal precedents, gathering information, drawing inferences, and returning an evidence-based answer.[62]

There are more legal focused AIs coming online every day.

There are more legal focused AIs coming online every day. ***Premonition*** analyzes public data in order to identify the best lawyers for a particular case.[63] ***Lex Machina*** applies analytics to intellectual property (IP) transactions and litigation, bringing together court records and other public data to predict case outcomes.[64] Clients seeking an AI's apparent neutrality find it in ***LISA***, an AI lawyer that advises both sides of a matter simultaneously while drafting non-disclosure agreements.[65] Globally operating organizations benefit from ***Leverton***, a contract review AI that is language-agnostic, creating summaries from deep learning about what clauses mean, not just how the language is expressed.[66] Victims of crime can get help from ***LawBot***, an AI that provides injured individuals with an assessment of their situation and guidance on getting legal help or going to the police.[67] Even the exercise of professional judgment is subject to replacement by ***TrademarkNow***, an AI that takes the heavy lifting out of trademark search, analysis, and protection by calculating how close trademarks are to one another, a feat once entirely within the purview of experienced IP counsel.[68]

AWS AND THE AI-ENABLED CLIENT

At the start of World War II, common wisdom was that the Germans would face an extended military campaign in France; instead, the German army marched down the Champs-Elysées in less than six weeks.[69] The decisive factor was not technology, but rather German doctrine that leveraged the unique advantages that aircraft, tanks, and radio provided when working together.[70] AWS present American war planners with an opportunity to use rapidly developing AI technology in similarly disruptive ways. Doing so is not merely an option. Rather, as more and more defense materiel comes from the commercial sector, the U.S. military's technological edge is steadily eroding, putting at risk our ability to counter numerically superior enemies with qualitatively better American forces.[71]

Unsurprisingly, AWS are a critical component of the Pentagon's third offset strategy.[72] The *third offset strategy* is about using innovative technology to detect adversary patterns, empower decision-makers, and act quicker than our foes.[73] Incredibly, in the face of this initiative, humans could become the limiting factor, especially as AI-enabled technology expands further into front-line combat and strategic decision-making roles.[74] For example, an AWS in a fighter plane will readily get inside a manned opponent's OODA loop[75] as a result of the AI going faster and with greater precision than what human pilots do intuitively.[76]

Looking beyond a specific physical implementation like an aircraft, AI systems can also reduce the cognitive burden on Air Force leadership, taking on data management tasks in which machines have the processing power advantage. For example, in the Joint Planning Process,[77] teams of Airmen with expertise in strategy, plans, and operations develop and wargame courses of action on behalf of senior military leaders.[78] Soon, each of these supporting players will be augmented or replaced by AI, speeding their analysis, and increasing visibility of decisive options. Nevertheless, given the breakneck pace of AI decision-making, commanders may

soon find themselves with no choice but to begin to cede some of their decisions over to these very same AI, skipping the weak, human link. Such is already the case in cyber. Attacks via cyberspace on U.S. Air Force networks happen faster than any human can respond.[79] AI defensive cyber-systems, operating in accordance with leadership guidance, act within milliseconds of detecting an attack. Only long after the response has been executed do commanders and analysts have the opportunity to evaluate the AI's decisions and actions.

AI will also influence the substance of Air Force decision-making by bringing deep learning capabilities to bear. As an example, AlphaGo's defeat of the world's greatest Go champion came as a shock: AlphaGo had played a professional player merely five months before the final showdown and it was clear that AlphaGo had numerous strategic weaknesses.[80] However, in the time between those first games and the championship, AlphaGo was "always improving, playing itself millions of times, incrementally revising its algorithms based on which sequences of play result in a higher win percentage."[81] Knowing this, AlphaGo's eventual victory almost seems a foregone conclusion. In the very same way AlphaGo learned to play a 2,500-year-old human game at a championship level in only a few months, military AI will do the same, contributing to the design and execution of strategy and operations and performing with an expertise that will rapidly exceed that of human leadership. The U.S. Air Force conducts military exercises and training to ensure that its Airmen and equipment are physically and mentally ready to fight; our AI will train as well, but at a pace of millions of times a day.

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AI will also have a substantial role in gathering and understanding the intelligence that underpins our strategic choices.[82] Today, a data analyst has to laboriously pour over mountains of intelligence reports in an effort to find actionable information.[83] Conscious and unconscious bias as to relevance and the importance of a piece of data or validity of a source can have a dramatic influence on the guidance provided to decision makers.[84] Further, there's a limit to how much an individual can read and understand under the tight time constraints of real-world operations. As the "Internet of Things" and always-on devices combine, the volume, velocity, and volatility of the "big data" generated will expand beyond what any human could comprehend.[85] As such, AI will be deployed against these enormous datasets, using unbiased[86] mathematical formulae, with the goal of sifting through the noise to find and surface the critical signal when it is most needed.[87]

Looking ahead, future AI implementations will move beyond autonomous mission *execution* to autonomous mission *performance*; a shift from blindly executing a pre-programmed plan to an AI-driven consideration of mission goals.[88] While traditionally the human brain was the most powerful tool to find optimal solutions in unforeseen situations, upcoming AI-enabled capabilities will readily adapt to dynamic environments via experiential deep learning.[89] Over time, such AI will learn to detect novel situations more quickly and accurately than even their human programmers.[90] Mission-essential flexibility, and the emergent behaviors that will result, will require that programming go beyond mere system operation, and into the laws and tactics that allow the AI to operate itself.

AUTONOMOUS HORIZONS—THE U.S. AIR FORCE DESIGN FOR AI

In 2015, the U.S. Air Force published ***Autonomous Horizons***, a publication outlining the Chief Scientist's vision for how Airmen will work with developing autonomous systems.[91] At its core, the goal is for the U.S. Air Force to deploy "autonomous systems that will work synergistically with our [A]irmen as part of an effective human-autonomy team," where functions and situational awareness transition flexibly, getting maximum performance from both human and machine.[92] The human-autonomy team will take full advantage of the best of both partners, recognizing that humans are great at thinking on the fly but that AI

is better at processing large volumes of data, quickly and consistently.[93] As such, the U.S. Air Force envisions deep-learning systems helping Airmen bring order out of chaos via human-machine collaboration, one of the key elements of the aforementioned third-offset strategy.[94]

Teaming with an AI that is adaptable and mission-focused, rather than merely following rules-based automation, raises unique considerations of trust.

In accord with this vision of human-autonomy teams, the U.S. Air Force will be building AI that will respond to situations that were not anticipated, across a wide range of operating conditions, environmental factors, and functions.[95] These AI will be capable of self-direction beyond simple rules-based approaches. Teaming with an AI that is adaptable and mission-focused, rather than merely following rules-based automation, raises unique considerations of trust:[96] not only how to get Airmen to have confidence in AI in the middle of complex, unpredictable and contested environments,[97] but also how well the human partner understands the AI's reasoning both before, during, and after working together.[98]

DEPARTMENT OF DEFENSE ARTIFICIAL INTELLIGENCE STRATEGY

As the Department of Defense woke up to AI, a myriad of organizations began developing and deploying artificial intelligence though without an express plan to coordinate development, share lessons learned, and avoid duplication.[99] At the announcement, the acting assistant secretary of Defense for R&D noted that on some of the first weekly calls to discuss AI, over 40 organizations and 150 people were represented, all actively building one or more AI solutions.[100] To address the challenge, in late 2018 DoD launched its AI plan with the release of the **Department of Defense Artificial Intelligence Strategy**.[101] The unclassified summary noted that the US must adopt AI "to maintain its strategic position and to prevail on future battlefields."[102] The Chief Information Officer put the problem another way: "[w]e've got to move at a lot faster pace and then do this at scale."[103] The "this" he is referencing is not merely AI, but rather DoD's leveraging of "real talent" and "real capability" to build out AI technology that will co-exist with current solutions, using common tools and processes and integrated with existing capabilities.[104] The central organization within DoD that will execute AI solutions is the Joint Artificial Intelligence Center (JAIC), a stand-alone organization that is designed to ensure that DoD effectively and ethically builds out AI capabilities.[105] Moreover, JAIC's mission is to accelerate delivery of AI solutions, establish a common foundation for DoD AI development, synchronize and coordinate DoD AI activities, and recruit world-class AI personnel.

PRESIDENTIAL EXECUTIVE ORDER ON AI

The President released **Executive Order (EO) 13859** on 11 February 2019 on "Maintaining American Leadership on Artificial Intelligence."[106] While the long-term impact of the EO is yet to be seen, the plan is intended to enhance national and economic security by directing federal agencies to make data and computing resources more available to artificial intelligence experts.[107] Similarly, it also obligates federal agencies to establish guidance so that new AI technologies are developed in a safe, trustworthy way. Importantly for DoD and its legal counsel, the EO solicits input on AI from federal agencies and then requires those same agencies to build a set of policies around their priorities.[108]

THE WAY FORWARD

The law is a set of rules: a complex mix of obligations, permissions, and prohibitions that govern human conduct. Composed of a generally consistent structure (at least as compared to unstructured data), the statutes, legal opinions, and judicial decisions that make up *the law* have a linguistic organization comparable to machine-readable code.[109] AI are similarly rules-based decision engines and it matters not whether those rules are crafted by human lawyers or developed iteratively via deep learning.[110] Accordingly, AI has a huge advantage in understanding and applying the law, especially when compared to other, less organized

or structured disciplines and situations.[111] This is an advantage that the JAG Corps should exploit to the fullest during the Air Force's transition to AI. But how to do it?

This article recommends that the *U.S. Air Force develop a deep-learning AI focused on operations law competency, whose capabilities are directed at supporting AWS, AI-enabled operations clients, and their human legal advisors for the purposes of training, planning, and mission execution*.

As Air Force legal counsel, we must rethink how we provide operations law guidance and to what extent AI will challenge our concept of what is within the rules.

The AI-enabled pace of the next battlefield will be as, if not more, shocking to us today as combined German arms were at the start of WWII. AI at least partially (if not entirely) outside the control of humans in actual combat roles is on our doorstep, notwithstanding current policy. These AWS will upend current notions of planning and executing military operations. Accordingly, as Air Force legal counsel, we must rethink how we provide operations law guidance and to what extent AI will challenge our concept of what is within the rules.

In future conflicts, U.S.-operated AI programmed based on the rules of engagement (ROE) and operating in accordance with the law of armed conflict (LOAC) will be an accepted fact; embedded ROE instruction along with algorithmic execution will enable LOAC to be observed more consistently.[112] In such a case, international humanitarian law (or even U.S. law) may treat the failure to use AI in this manner as unethical or even illegal, making the concept of actual human control a problematic issue to be solved.[113] In such a case, the *failure* to embed legal rules deeply into AWS may be a LOAC violation.[114] Given these facts, AI legal counsel (or, at a minimum, AI-enabled counsel) may prove to be the only way in which legal guidance can be provided to an AWS in a timely, useful context within the nascent legal guidelines for AI. Furthermore, while today's judge advocates would certainly outperform AI in providing actionable, legal guidance, it is only a matter of time before AI lawyers catch up to the best humans have to offer. Similar to what we saw with AlphaGo, the passage of time works to the advantage of AI. As compared to human counsel, AI will learn faster and ingest more information, blending together the wisdom of senior lawyers along with data from decades of operational experience. Moreover, a legal AI will prove to be far more adaptable than existing processes. Changes to the operating environment, including changes to the ROE, can be implemented inside a guiding AI with immediate effect across a warzone, reducing the chance of error for humans and AWS alike. AI could also quickly identify conflicted or missing authorities, flagging the issue for human evaluation.

How could such a system be developed? During the Iraq and Afghanistan wars, DoD collected incredible amounts of data; in one example, detailed information on the more than 20,000 combat air sorties that took place in Iraq and Syria, on average, each year from 2015-2017.[115] For each of these sorties, the data collected, including outcomes and operating conditions such as in-force ROE, can be processed by a deep-learning engine. Subsequently, the AI would understand the legal framework in which the operations were conducted, be able to compare it to the behavior of the participants, and extrapolate toward future operations. Such functionality would work across multiple weapon and AI-enabled platforms, with the AI utilizing the relevant portions of ROE for different missions, loadouts, and vehicle and sensor capabilities. Recognizing that a particular AWS possesses unique operational capabilities, is located in a different AOR with different ROE, and adjusting guidance accordingly will be entirely within the AI's ability.

The AI legal advisor will also prove to be more capable than human lawyers at operating as fast as the AI-enabled battlefield. With the expectation that AIs will be both embedded with U.S. and allied systems as well as fielded by adversaries, only an AI lawyer will be in an equivalent position to respond to the unexpected, emergent behavior such AIs will exhibit in contested space.

Nonetheless, U.S. Air Force lawyers will continue to have an essential role, operating, validating and refining the legal AI—a tool that gives them broad situational awareness, an incredible grasp of history, and an understanding of the law that is second to none. Combined with AIs embedded into both the planning process and the weapon systems, our performance as legal counsel—both qualitatively and temporally—will be dramatically improved by use of legal AI, supporting the enhanced decision making needed on tomorrow's battlefield.

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At the same time, there will be risks from increasing our reliance on unproven technology, especially as it relates to developing trust within the human-autonomy teams. Trust arises when Airmen have an understanding of how their AI partner is making a decision. However, this is not easily achieved when the AI is using a deep-learning neural network.[116] Deep learning operates by discovering otherwise invisible patterns and correlation across the contents of data sets.[117]

As such, unlike traditional expert systems or simple (if brittle) automation, even the programmers may not understand how the neural network reached a decision.[118] Worse, the data sets involved are too unwieldy to manage with conventional data tools, making after-the-fact analysis impossible.[119] If the AI provides an unexpected output, Airmen won't necessarily know whether the AI is working properly and presenting them with an innovative solution, or whether the system is simply making a mistake. As such, the neural networks will ultimately need more than trust; they will require *faith*[120] that they are operating as intended.[121] How will we work with machines that operate in ways their creators don't entirely understand? By programming the AI to operate within our broad mission intent, and ensuring the system reaches back to human decision-making when exceptions arise.[122]

While this sophisticated, deep-learning AI is in development, the JAG Corps should move forward by implementing AI for some of our traditional legal services. The launch of WebFLITE in the 1990s had a dramatic effect on our day-to-day operations and even now is the focal point of knowledge management, organization, and administration for the entire JAG Corps. AI has the potential to do this and more, both by collecting the wisdom of judge advocates (much as WebFLITE does today) and by making this experience and advice readily available directly to judge advocates and our clients. How? *By pre-packaging legal expertise on a host of topics—military justice, legal assistance, contracts, and more—into AI built around natural language processing, we can make military law available to anyone. As an example, consider The Military Commander and the Law*,[123] but add a natural language interface, a responsive AI, and 24/7 availability. It's not a question of whether the AI can serve as a lawyer, but instead, how legal-centric AI will help our clients and commanders by making complex matters routine. Air Force Instructions—helpfully written in a machine-readable structure—are ripe for similar AI support. Clients accessing these technologies will appreciate the ability to dispose of matters quickly, with less need for personalized legal intervention. The JAG Corps will benefit from increased productivity and the ability to weigh in on more important issues using the same resources.

AI-enabled support can enhance the *quality* of legal service as well. The collective expertise of a community of the best legal minds, distilled via AI, can outperform even the most talented individual. Further, legal advice from an AI is infinitely scalable and can be delivered concurrently to an unlimited number of parties; such scalability benefits clients and leverages machine learning. The more the AI does, the more it learns, and the more competent it becomes. Bringing AI into the JAG office will institutionalize this advantage.

The more the AI does, the more it learns, and the more competent it becomes.

Even in this AI-enabled world, attorney responsibilities towards clients and outcomes will remain the same; the change is only to the manner of doing legal work. Our expertise will still be sought in those areas the AI can't support, or when an issue exceeds its understanding. Nonetheless, our paramount mission is to help commanders and clients meet their legal challenges the best we can, not hold onto outdated working and manpower practices.

CONCLUSION

Over a century ago at Kitty Hawk, two bicycle mechanics started the age of air travel with a canvas-covered flying machine that invented the future in about 80 seconds. Fifty years later, jets were routinely taking millions of passengers across the oceans, and not one, but two world wars had been fought from the sky. Much like those brothers on a North Carolina beach, AI is on the verge of rapidly overturning our understanding of warfare and how we practice law in support of those who fight.

AWS will be a reality. If unleashing AI-enabled weapons means victory, they will be used to devastating effect to target more precisely, act more quickly, and be more flexible than any human warfighter. Even so, the first day of AI war won't look like war at all.[124] Each side will be gathering up information—a data collection blitzkrieg—to feed the massive AIs running their respective war efforts. Whoever collects the most data in the least time wins.[125]

The United States must lead this revolution. Nevertheless, in a world where IBM's general counsel has stated that their Watson AI could pass the bar exam,[126] lawyers may prove resistant to adopting AI until it's too late. While it is understandable to want proof that a new system is more effective than existing practice, the danger is that *in AI, being second is the same as being last*. Early adoption is key. AI systems learn by doing.

In AI, being second is the same as being last. Early adoption is key. AI systems learn by doing.

The emerging U.S. Air Force legal practice that teams AI-enabled thinking machines and legal counsel will be entirely different from that which has come before. Air Force JAGs will be partnering with AIs driven by algorithms that are so complex and working with data sets that are so large that we won't be able to understand how they operate. We'll be using data as fuel[127] to power deep learning systems to create weapons, design strategies, and maneuver at the speed of light. We will participate in wargames against AIs that actively mimic adversary behavior. We will train U.S. forces and the AI weapon systems they fight alongside, each capable of improvising on their own. In areas like cyber, we'll work with commanders to delegate even more authority to AI because the need to respond in milliseconds to protect critical systems makes autonomy the only reasonable solution. But ultimately, judge advocates will remain some of the most trusted advisors to U.S. Air Force leadership. As such, it falls to us to guide the U.S. Air Force in preparing for the arrival of the age of AI.

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EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **Bernard Marr Website:** What Is Deep Learning AI? A Simple Guide With 8 Practical Examples, https://bernardmarr.com/default.asp?contentID=1572
- **Center for Strategic & International Studies (CSIS):** Assessing the Third Offset Strategy (Mar 16, 2017 https://www.csis.org/analysis/assessing-third-offset-strategy
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ENDNOTES

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"Why We Fight"

The Importance of Advocacy Training at The Judge Advocate General's School

BY LIEUTENANT COLONEL CHARLES G. WARREN*

What good is being a subject matter expert in the administration of military justice if you cannot convince your colleagues, your commanders, and when it comes down to it, the court-martial members, that your application of the law is not only the correct one, but the just one.

Shortly after the United States entered World War II, the United States government commissioned renowned Hollywood director, Frank Capra, to create a series of films to convince American troops of the righteousness of the war. The name of the series was ***Why We Fight***. In time, it was used to convince not only American troops, but the American people, of the righteousness of our cause. It was also one of the most successful documentaries commissioned by the United States government because it provided motivation for an entire nation as to why the contributions of all were necessary for America and our democratic values to prevail. In commemoration of my time as the Chief of the Military Justice Division for The Air Force Judge Advocate General's School (AFJAGS), I offer a *Why We Fight* type explanation on the prominence we place on advocacy training at AFJAGS to our field of multi-talented judge advocates, many of whom specialize in areas *outside* of military justice.

Think back to JASOC . . . remember your mock trial? Some of you may have loved it, some of you probably hated it, but you all had to go through it. The question is WHY?

Many of you may not have litigated a court-martial since the completion of your second base legal assignment. Some of you may not do much criminal litigation after "certification" depending upon your base of assignment and the ops tempo there. So, why take the time, effort, and "pain" of pushing you through the crucible of the courtroom for a skillset you may only use for the first few years of your career? Well, the answer is simple: whether you are in or out of the courtroom, **litigation skills are leadership skills**. As judge advocates, our profession demands and deserves both.

Advocacy is a force multiplier for the application of all of the other subject matters we endeavor to impart. After all, what

good is being a subject matter expert in the administration of military justice if you cannot convince your colleagues, your commanders, and when it comes down to it, the court-martial members, that your application of the law is not only the correct one, but the just one.

Accordingly, there are three primary reasons AFJAGS dedicates itself so intently to military justice advocacy training:

Reason #1: Advocacy is our core identity as judge advocates

Reason #2: Excellence takes time and advocacy takes practice

Reason #3: Litigation skills are leadership skills

In turn, these are reasons why fellow judge advocates should accept the challenge of military justice advocacy training early in your career as part of your "core curriculum" for what it means to be a judge advocate.

WHY WE FIGHT

REASON #1: ADVOCACY IS OUR CORE IDENTITY AS JUDGE ADVOCATES

"Judge" and "advocate"—it's right there in the name. When you boil it all down, the core competency of a "JAG" is to "judge" the legal and operational environment of a given situation, and then to "advocate" with and for his or her clients and commanders to reach the optimal outcome for the mission under the law. Advocacy isn't just what we do, in a very real sense, it's **who we are**.

Looking back at the **history of judge advocates**, beginning with the appointment of the very first judge advocate to the Continental Army in July 1775, advocacy has always been our stock-in-trade.[1]

After all, it was Colonel John Laurence, second Judge Advocate General of the Continental Army, who personally prosecuted British Major John Andre in connection with the treason and defection of **General Benedict Arnold** in September 1780.[2] Judge advocates prosecuted the conspirators in the President Lincoln assassination at a military tribunal in May-June 1865.[3] It was judge advocates assisting the international prosecution team at the Japanese and Nuremberg War Crimes tribunals following World War II.[4] Honing our advocacy skills is essential to keeping faith with our fundamental identity as judge advocates, which still includes a functional working knowledge of military justice and courts-martial. That said, while our mission was originally primarily military justice, obviously ours and all sister service JAG Corps have evolved as our military mission and the complex government actions they support have evolved. Thus, what began as an imperative to develop advocacy in the courtroom now requires advocacy, just as confidently and competently, across the legal spectrum.

Our trial advocacy training—it's not just for the courtroom

You may be thinking: *Well, that explains why we focused on trial advocacy training in the past, but why do we focus on it in the present?* Briefly, **trial advocacy doesn't just train litigators; it trains "advocates,"** writ large. We use trial advocacy training as a tool to hone the advocacy instincts and prowess of our judge advocates. **Lieutenant General Rockwell,** The Judge Advocate General, pointed this out to me in the spring of 2016, as I was preparing JASOC Class 16-B for their military justice exam review. I addressed the students as "litigators" since they had just successfully completed a fully-litigated general court-martial mock trial—surviving their initial "trial by fire." Then-Major General Rockwell smiled and gently corrected me in front of the class, as he explained, **"you don't all have to be litigators, but you are all advocates."**[5]

His statement really stuck with me. It brought home one of the underlying purposes of our trial advocacy training—it's not just for the courtroom; it's for the conference room, the war room, and wherever JAGs are called upon to give on-time/on-target legal advice for our mission. In training our judge advocates in advocacy, we aren't just training them

to accomplish a single mission (*i.e.* military justice), we are training them to help accomplish **all our missions**.

REASON #2: EXCELLENCE TAKES TIME AND ADVOCACY TAKES PRACTICE

The second reason why we focus so intently on advocacy training at AFJAGS is simple, excellence takes time. Investing the time will ultimately build the **confidence** and **competence** resulting in solid **credibility** for all of our judge advocates. Think of it like investing. We're all told to begin investing for retirement as early as we possibly can after we begin our adult careers. Early investments create a solid base that pays dividends down the road with compound interest. On top of the initial investment, establishing momentum early on sets us up for financial success. The same effect can be seen with early advocacy training.

Candidly, it's all the more important to start advocacy training from the very start of our careers as judge advocates because, for many, it is something they may not seek out on their own. In each of my eight JASOC courses, I took an informal poll on day one of the military justice curriculum to see who had an interest in litigation. For every JASOC, the number hovered around 50 percent. Those results beg an interesting question: if "advocacy" (including basic competence in court-martial litigation) is a core mission of the Corps and directly linked to our historic identity as a Corps, why is there only middling interest? Based on my experience as a young advocate and drawing upon my observations of over 350 young lawyers, I think I have an answer—fear of failure and personal embarrassment.

> By focusing on the "needs of the case" rather than my own personal needs (*i.e.* to avoid embarrassment), it gave me new boldness and purpose.

Of course, there's only one way to overcome that fear—face it. Our young judge advocates don't avoid trial advocacy because they are looking to "duck work." Far from it; they joined to serve their country. They want to thrive; they want to be value-added. Ironically, it's the desire to thrive that sometimes creates a performance-paralyzing fear. They are afraid that they will fail in the courtroom because it is new to them, and they don't want to let themselves, their office, and our Air Force down. All of these are natural concerns, properly harnessed, can actually fuel performance.

As a young JAG, I was terrified of losing my cases and embarrassing myself in the courtroom. I wasn't "good enough" by my own personal standards. I was paralyzed by fear, and it was hurting my performance. I didn't know it at the time, but I needed to change my perspective. That change came for me toward the middle of my first assignment. I was neck deep preparing my first fully-litigated, general court-martial. The case involved sexual assault at the Air Force Academy and had received national media attention. As I contemplated how to navigate through the trial without screwing up, I realized I was asking the wrong question. Being a judge advocate meant embracing our core Air Force values, one of which is **"service before self."** I realized that by focusing on my fear of embarrassment, I had inadvertently been placing "self before service." I began to shift to a better mindset: **"what are the needs of the case?"** By focusing on the "needs of the case" rather than my own personal needs (*i.e.* to avoid embarrassment), it gave me new boldness and purpose. I became less self-centered, and more case centered. It made all the difference. I didn't become a better advocate overnight, but it cleared the way for improvement. We learn by doing, not by avoiding.

Applying the principle of doing, our AFJAGS training regime takes into consideration the vast majority start at "ground zero" in terms of trial advocacy experience. Rome wasn't built in a day. So we've endeavored to build a tiered training approach to developing advocates, brick by brick. Great advocates only make it LOOK easy; they got there the same way—step by step.

TIER 1: JASOC. The JASOC mock trial and commander advice exercises lay the groundwork for our in- and out-of-the-courtroom advocacy skills.

TIER 2: ISALC/TRIALS. All base level JAGs, Area Defense Counsel (ADC), and Special Victims' Counsel (SVC) should attend one of the Intermediate Sexual Assault Litigation Course (ISALC) and Training by Reservists in Advocacy and Litigation Skills (TRIALS) courses. The TRIALS course in particular is a great opportunity to receive pointed feedback from senior, skilled litigators on discrete aspects of trial advocacy skills and collaborate with others. It's laid out like the JASOC advocacy seminars; breaking the trial down into component parts and then providing individualized performance feedback.

TIER 3: TDAC. The Trial and Defense Advocacy Course (TDAC) is designed for second assignment trial counsel and sitting ADC. They receive the benefit of instruction from a combined all-star cadre of AFJAGS, STCs, and SDCs. They're also called upon to litigate MRE 412, 413, 513, and 514 issues while integrating them into their trial plan. TDAC has also been revamped to include 30 percent "on your feet" litigation time in a seminar format where participants learn in small groups from fellow students and instructors. Seminars provide helpful demonstrations and personal critiques on performance. While not everyone can attend TDAC, everyone should try. There are 36 student slots available each TDAC, and many times vacant slots open up.

TIER 4: ATAC/ASALC. The top tier of advocacy training at AFJAGS is the Advanced Trial Advocacy Course (soon to be renamed "Strategic Trial Communication" course (STC)) and the Advanced Sexual Assault Litigation Course. ATAC is designed for persons identified for STC and SDC assignments. ASALC is designed for persons identified for SSVC, STC, and SDC assignments. These courses are offered once per year, and there are 18 student slots available for each. However, particularly for ATAC, there are generally more slots available than Air Force students that sign up. ATAC propels litigators to get out of their "comfort zone" and challenges them to become more relatable with court-martial members. Participants are challenged to implement storytelling techniques; incorporate selective application of pitch, tone, and cadence; and improve nonverbal communication in movements/gestures/facial expressions to maximize persuasiveness and project authenticity that enhances credibility and connectivity with an audience.

The takeaway to tiered training is this: all JAGs should/must complete tiers 1-2, and tier 3 should likewise be at least aspirational for all JAGs. The training you receive will not only make you better litigators, but better JAGs as discussed below. And for those of you who think you've acquired all the practical training you need in your court-martial experiences, please heed this friendly word of warning: complacency is the first step to mediocrity. The will to win is the will to prepare—so prepare for excellence with us at AFJAGS. Remember, excellence isn't a "goal" in the Air Force—it's the standard. And excellence takes time, so invest that time in yourself and our JAG Corps.

> As judge advocates, we must never forget that we are called upon to be both officers and attorneys. Officership requires leadership.

REASON #3:
LITIGATION SKILLS ARE LEADERSHIP SKILLS

Bringing it all together, we focus on trial advocacy skills at AFJAGS because **litigation skills are leadership skills**. Don't believe me? Consider this: exceptional advocates excel in a common set of characteristics: (1) preparation; (2) goal-orientation; (3) processing/synthesizing information; and (4) strategic planning. These characteristics are essential to effective leadership as well. Trial advocacy creates and hones leadership by challenging advocates to: develop the ability to think on their feet; communicate persuasively; organize facts and prioritize key tasks; stay cool under pressure; and act decisively even with imperfect and incomplete information. The last may be the most important military attribute.

By way of example, consider the leadership applicability for some of the skills required to thrive at various critical aspects of a court-martial.

Opening Statement: *Empathy/Narrative.* A great leader understands how to connect and communicate with their audience. Effective leaders craft their message by meeting their team/audience where they are. This requires they understand their audience's biases and "filters," while helping guide them to the best outcomes. That's precisely what an advocate does in opening statement, enhanced by using relatable language to weave a compelling "narrative" (*i.e.* story) the members can connect with and understand.

Direct Examination: *Organization/Emphasis*. Advocates understand direct examination is not just a recitation of everything the witness knows, but rather a carefully choreographed focus on key facts the witness has to support that attorney's theme and theory of the case. This teaches young advocates the importance of both organization and emphasis. Organizing the key points in a manner that makes sense (chronologically or thematically) and then developing tools to emphasize the respective information (signposting, looping, etc.).

Cross Examination: *Decisiveness/Target Identification*. Cross examination trains advocates to get to the heart of the matter. No need to rehash all the myriad of inconsistencies or incongruences—you'll likely lose the members along the way. Learning how to identify the key points from the standpoint of what is most significant to your audience is a key skill in and out of the courtroom. It trains JAGs to be responsive to the informational needs of the commander, rather than an exhaustive cataloging of all the issues which may potentially exist. Cross examination teaches the "BLUF" (bottom line up front), or the facts most salient to the commander's decision making.

Closing Argument: *Distilling/Clarifying Information*. Every JAG should pride themselves on being a "closer." This means someone who is able to distill a complicated situation—be it a contract, civil law, legal assistance, or a military justice issue—into a clear course of action for a decision maker. You will receive no better training at this key skill than in compiling a closing argument that synthesizes hundreds of pages, dozens of hours of witness interviews, and days of court-martial into a focused distillation of the key decision points in a case. Developing a "closer's mentality" will make you the "go-to JAG" our commanders want and need.

As judge advocates, we must never forget that we are called upon to be both officers and attorneys. Officership requires leadership. In turn, advocacy aids us in both pursuits because leaders must be able and willing to advocate for the course of action they believe the mission demands. Once again, this is where AFJAGS advocacy training focus comes in—because if you're going to have an advocate's mindset, then you need to have an advocate's toolbox. So long as the practice of law involves not just the recitation of citations, but the providing of advice and counsel, our fundamental need for advocacy in all aspects of the profession will be paramount.

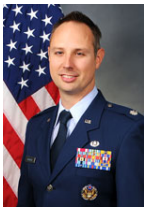
CLOSING

> Justice, in all its forms (civil, criminal, military), cannot be obtained without advocacy.

The next time you're tempted to ask "why we fight," or why we feature military justice advocacy training so prominently at AFJAGS, look no further down than the badge proudly displayed on your chest. Justice, in all its forms (civil, criminal, military), cannot be obtained without advocacy. Our commanders deserve attorneys with both the **judgment** to know the best course of action and the **advocacy** skills to secure it. Finally, as Lieutenant General Rockwell reminded that JASOC class back in 2016, embrace your role as an advocate: it's an irreducible part of who were are as individuals and as a Corps!

*This article is dedicated to the 366 judge advocates it was my honor to train in JASOC classes 16-A through 18-B from October 2015 to April 2018. The drive, dedication, and enthusiasm of these students was and is an inspiration to our JAG School and our JAG Corps. To all of my former students I say with great affection: "stay in the fight, JASOC!"

ABOUT THE AUTHOR



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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **General Leadership Blog:** Wisdom learned from bomb squad experts and their commanders
- **TEDx, Amy Cuddy:** Your body language may shape who you are (18:51)
- **TEDx, Nancy Duarte:** Common structure of greatest communicators (18:11)
- **TEDx, Simon Lancaster:** Speak like a leader (18:47)

ENDNOTES

[1] *A History of the Judge Advocate General's Corps*, 1775-1975, Army Lawyer 7 (1975), https://www.loc.gov/rr/frd/Military_Law/pdf/lawyer.pdf (last visited Oct. 1, 2018) [hereinafter Army Lawyer]. (Congress appointed the very first judge advocate, Lieutenant Colonel William Tudor, to the Continental Army on 29 July 1775, a mere 26 days after General George Washington assumed command of that fledgling force. Moreover, it was none other than General Washington himself who identified trial advocacy as one of the primary reasons for an attorney on his general staff, noting that courts-martial were sitting everyday in his new command and that the expertise of a skilled trial lawyer were "sorely needed." *Id.* at 12.)

[2] William F. Fratcher, History of the Judge Advocate General's Corps, United States Army, 4 Mil. L. Rev. 89, 90 (1959). (Demonstrating the zealous advocacy that would become the hallmark of our Judge Advocate General's Corps writ large, it was in this famous court-martial that Colonel Laurence uttered his now immortalized phrase to Maj John Andre during cross examination of the accused: *"You, Sir, are a spy!" Id.* at 17-18.)

[3] Army Lawyer, *supra* note 1, at 63. (The Judge Advocate General of the Army, Brig Gen Joseph Holt, served as lead prosecutor for the military commissions trying the Lincoln assassination conspirators. A staff of other judge advocates joined Brig Gen Holt, including Maj Henry L. Burnett (also counsel of record in the Supreme Court case Ex parte Milligan (1866), Id. at 54), and Maj John Bingham (an eight-term Congressman from Ohio who interrupted his Congressional service to serve as an Army judge advocate during the Civil War. Upon returning to Congress after the war, he also served as one of the principal drafters of the Fourteenth Amendment, Id. at 54-55). In all, the judge advocate prosecution team would go on to prosecute all eight conspirators in a month and a half long trial resulting in death sentences for four of the eight convicted conspirators. Id. at 63.)

[4] Army Lawyer, supra note 1, at 181. (Judge advocates were at the tip of the spear of war crimes prosecutions even prior to the cessation of hostilities in World War II. In a letter dated September 25, 1944, Subject: "Punishment of War Criminals," the Secretary of War, Henry L. Stimson (himself a former Army judge advocate during World War I), directed The Judge Advocate General to establish an office agency under his direction which would at once collect all evidence of cruelties, atrocities and acts of oppression against members of our armed forces and other Americans; examine and sift through such evidence; arrange for the apprehension and prompt trial of persons against whom a prima facie case was made out; and provide for the execution of sentences which might be imposed.

Nuremburg War Crime Tribunals: In April of 1945, The Judge Advocate General of the US Army assumed the responsibility for sending some 60 legal officers to Germany to assist the Theater Commander in investigating and prosecuting war criminals. After cessation of hostilities, the evidence accumulated of atrocities committed by enemy personnel was correlated and, except for the trial of certain major war criminals who were brought before international military tribunals established by international agreement (i.e. the Nuremburg International War Crime Tribunal, see below), by order of President Truman, the Judge Advocate General's Department supervised the trial of more than 2,500 war criminals by military commission and military government court. *Id.* at 181-184 and Executive Order 9679: "Amendment of Executive Order No. 9547 of May 2, 1945, Entitled *Providing for Representation of the United States in Preparing and Prosecuting Charges of Atrocities and War Crimes Against the Leaders of the European Axis Powers and Their Principal Agents and Accessories*," 450 (16 January 1946) https://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf.

Furthermore, while the prosecution of those most notorious Nazi war criminals was spearheaded by United States Supreme Court Justice Robert Jackson who lead the American legal team at Nuremburg, his staff included dozens of judge advocates, including most prominently Colonel Robert Story, US Army judge advocate, who acted as his executive counsel, and Brig Gen Telford Taylor, who served as Justice Jackson's Deputy Chief Counsel. *Id.* at 183. In sum, judge advocates made up the plurality of the American legal team, comprising 289 of the 654 person legal and administrative staff drawn from all government departments: War, Navy, State, and Justice, performing the essential work of researching the files of suspected war criminals, summarizing voluminous records; and framing allegations. Justice Jackson praised this staff work as indispensable in his report to the President in 1946. *Report of Robert H. Jackson, Representative of the United States to the International Conference on Military Trials*, 452-53, 455 (7 October 1946) https://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf.

Japanese War Crime Tribunals: Army judge advocates actually drafted the charge and specifications and served as prosecutors and military defense counsel in the military commission against Japanese General Tomoyuki Yamashita, former commanding general of the Japanese Fourteenth Army Group in the Philippines. General Yamashita's forces engaged in systematic war crimes against American military personnel and Philippine civilians. After a robust defense, and representation by six defense counsel, General Yamashita was convicted and sentenced to death. The Supreme Court of the United States affirmed the findings and sentence (and the overall legality of the underlying military commissions process) in the landmark case, *In re Yamashita*, 327 U.S. 1 (1946). *See generally, The Case of General Yamashita, A Memorandum* (22 November 1949), Brig Gen Courtney Whitney, USA, https://www.loc.gov/rr/frd/Military_Law/pdf/Yamashita.pdf.)

[5] Lt Gen Jeffrey Rockwell, (then) Deputy Judge Advocate General, United States Air Force, Personal remarks at the Air Force Judge Advocate General's School (13 March 2015))

R.C.M. 905(e)'s New, Incomprehensible Standard

Changes to the military rules, effective 1 January 2019, establishes a novel affirmative waiver standard for failing to timely object under R.C.M. 905 that makes no sense, is inconsistent with other rules, and will lead to further confusion.

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BY COLONEL JAMES A. YOUNG, USAF (RET)

Many military appeals involve issues the appellant failed to raise at trial. Determining whether the issue is subject to appellate review, and if so, under what standard, is often difficult and provokes much disagreement. One particularly contentious area concerns Rule for Courts-Martial (R.C.M.) 905, which requires certain motions, defenses, and objections to be raised before pleas are entered and the consequences of failing to do so.[1] Changes to the military rules, effective 1 January 2019, establishes a novel affirmative waiver standard for failing to timely object under R.C.M. 905 that makes no sense, is inconsistent with other rules, and will lead to further confusion. This article examines the historical context of R.C.M. 905, its newly enacted standard, and recommends changes to conform more closely to federal civilian practice.

BACKGROUND

The Constitution of the United States granted Congress the authority "[t]o make Rules for the Government and Regulation of the land and naval Forces."[2] Congress delegated authority to the President in Article 36(a), Uniform Code of Military Justice (UCMJ), to prescribe trial procedures and rules of evidence "by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not…be contrary to or inconsistent with [the UCMJ]."[3]

Consistent with the congressional mandate in Article 36(a), the history of court-martial practice over the almost seventy years since enactment of the UCMJ has been one

of slow evolution in adopting the standards and procedures of federal criminal practice. On 12 March 1980, President Carter signed an executive order promulgating the Military Rules of Evidence.[4] These rules adopted both the form and much of the substance of the Federal Rules of Evidence.[5]

The project to draft the Military Rules of Evidence demonstrated the value of a comprehensive examination of the *Manual for Courts-Martial*, as a whole. Consequently, the Department of Defense General Counsel directed that the Manual be revised.[6] The stated goals for the revision included that it conform to federal practice to the extent possible and that it switch in form from narrative paragraphs to rules.[7] In 1984, President Reagan promulgated the Rules for Courts-Martial (R.C.M.), as Part II of the totally revamped *Manual*, in 1984.[8]

R.C.M. 905 was an attempt to conform military practice to Federal Rule of Criminal Procedure 12.

FEDERAL RULE OF CRIMINAL PROCEDURE 12

R.C.M. 905 was an attempt to conform military practice to Federal Rule of Criminal Procedure 12.[9] Rule 12 required the parties to raise before trial motions, defenses, and objections, falling within certain specified, general categories before trial: (A) defects in the institution of the prosecution; (B) defects in the indictment or information (other than jurisdictional challenges, including the failure to charge an offense); (C) to suppress evidence; (D) for severance of charges or defendants; or (E) for discovery.[10] The failure to timely raise these motions, defenses, and objections constituted waiver, although the court could grant relief from the waiver for good cause shown.[11]

For the most part, the federal circuit courts of appeals recognized the plain language of Rule 12. The failure to raise one of the listed defenses, motions, or objections was to be treated as if the party had waived the issue.[12]

In 2002, the "language of Rule 12 [was] amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules."[13] The restyling discarded the passive voice, providing instead that a party "waives" the listed defense or objection by not timely filing. Despite the revision, "the Committee intend[ed] to make no change in the current law regarding waivers of motions or defenses."[14]

Regardless of the Advisory Committee's clear intentions, the change caused one panel of the U.S. Court of Appeals for the Sixth Circuit to reconsider its position on the application of Rule 12. The court noted that the term "waiver" is normally associated with a knowing and intelligent abandonment of rights, "If a defendant, out of neglect, fails to move to suppress evidence in the district court, that conduct is more akin to a forfeiture than a waiver."[15] So, the court reviewed for plain error.[16] Other courts, however, consistent with the Advisory Committee's intentions, continued to hold that the failure to raise the issue amounted to waiver or barred the petitioner from raising the issue on appeal.[17]

In 2014, Fed. R. Crim. P. 12 was substantially revised and restyled again. The Advisory Committee specified some of the motions, defenses, and objections that must be raised before trial within the previously drawn general categories[18] but limited the requirement to file before trial to those in which "the basis for the motion is then reasonably available."[19] The revisions also attempted to dispel confusion caused by applying the concept of waiver to issues that had not been knowingly and intentionally abandoned: "If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause."[20]

> New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a crimi-

nal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

New paragraph 12(c)(3) retains the existing standard for untimely claims. The party seeking relief must show "good cause" for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case.[21]

From the Advisory Committee Notes, it is clear that Rule 12(b)(3) is a timing rule; it is neither a waiver nor a plain error rule. It is not a waiver rule for two reasons: (1) the objections are treated as waived without a showing that the accused knowingly and intelligently abandoned the rights involved; and (2) an accused is entitled to raise a defense or objection outside the prescribed time limit for good cause shown. If the untimely objection were actually waived, any error would be extinguished and, thus, there would be no remedy available to the accused even if the accused could establish good cause for not timely raising it.[22] It is not a plain error rule because the plain language of the Advisory Committee Notes, which are relevant evidence of the drafters' intent,[23] establish that unless the accused is able to show good cause for not timely raising the issue, it may not be considered by the court.

> Over the years, while Rule 12 was revised and restyled, R.C.M. 905 remained basically the same.

RULE FOR COURTS-MARTIAL 905

With minor modifications to account for the different terminology in military practice, R.C.M. 905(b) as promulgated in 1984 embraced Rule 12's general categories of motions, defenses, and objections that must be raised before entry of pleas, as follows:

(1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation, or referral of charges;

(2) Defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which objections shall be resolved by the military judge at any time during the pendency of the proceedings);

(3) Motions to suppress evidence;

(4) Motions for discovery under R.C.M. 701 or for production of witnesses or evidence; or

(5) Denial of request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

The remedy for failing to timely file was also based on the remedy that was applied in federal courts under Rule 12: "Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver."[24]

Over the years, while Rule 12 was revised and restyled, R.C.M. 905 remained basically the same. The President did not adopt the 2014 changes to Rule 12. Of course, R.C.M. 905(e) does not suggest that to apply waiver to the failure to object the accused had to knowingly and intelligently abandon the issue. Rather, the plain language of the rule demonstrates an intention merely to treat the issue as if it had been waived.

Although use of the term "shall constitute waiver" has caused some difficulty, the objective of R.C.M. 905(e) makes sense. "The rationale behind waiver is 'to eliminate the expense to the parties and the public of rehearing an

issue that could have been dealt with by a timely objection or motion at trial' by the one party best positioned to make that happen—the party in need of relief."[25]

All of the categories listed in R.C.M. 905(b) are matters known to or discoverable by the accused and his counsel before trial. The accused and his counsel have time to research these issues and timely enter objections before entering pleas. If an accused has good cause for failing to meet the timing requirement— e.g., if the prosecution failed to provide timely discovery—then the court may permit the accused to raise the issue after the entry of pleas.

In 2014, the Federal Rules Advisory Committee made a special effort to more specifically define the issues that must be raised before trial. The drafters of the new R.C.M. 905 made no such effort….

Admittedly, the Court of Appeals for the Armed Forces (CAAF) has been somewhat confused by the term "shall constitute waiver," as used in R.C.M. 905(e). It has interpreted the term to mean:

(1) waiver, but searched to see if the appellant had been prejudiced;[26]
(2) waiver, but declined to enforce the waiver because the Government had not cited to the rule in its brief;[27]
(3) waiver, but actually reviewed for plain error;[28]
(4) waiver.[29]

Most recently, in *United States v. Hardy*,[30] the CAAF determined that the "shall constitute waiver" language in R.C.M. 905(e) means what it says: An accused waives, rather than forfeits absent plain error, a R.C.M. 905(b) motion he fails to timely raise. But the Court noted that the amendments to R.C.M. 905(e) scheduled to take effect on 1 January 2019 would change the standard.[31]

THE NEW R.C.M. 905

In 2014, the Federal Rules Advisory Committee made a special effort to more specifically define the issues that must be raised before trial.[32] The drafters of the new R.C.M. 905 made no such effort and the general categories remain vague without further explanation. Although the President must conform military rules to federal principles only "so far as he considers practicable,"[33] there does not appear to be any military reason why it would not be feasible to adopt the changes to Rule 12 in R.C.M. 905.

As noted by the CAAF in Hardy, R.C.M. 905(e) was amended and restyled in the new Rules for Courts-Martial, effective on 1 January 2019.

> Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule *forfeits the defenses or objections absent an affirmative waiver*. The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule.[34]

This new standard for failing to timely object—forfeits absent an affirmative waiver—is novel, makes no sense, and demonstrates a significant misunderstanding of basic legal concepts.

The term "forfeits" refers to losing "a right, privilege, or property because of a crime, breach of obligation, or neglect of duty."[35] Under the new standard, then, a party unable to show good cause abandons any claim of error unless he affirmatively waives the error. Of course, if he affirmatively waives the error, he also abandons it. But R.C.M. 905(b) concerns the failure to timely raise an issue, and for the accused to have affirmatively waived the issue, someone must have raised it before trial, thus nullifying the applicability of R.C.M. 905(e)(1) to the issue in its entirety.

Perhaps the drafters meant that courts should review the failure to timely file for plain error. If so, there is a time-honored way to express it: "forfeit absent plain error"—the party abandons or relinquishes any claim of error unless he can "establish an error which 'must not only be both obvious and substantial, it must also have had an unfair prejudicial impact on the jury's deliberations.'"[36]

But plain error is not the appropriate standard for reviewing the failure of counsel to make timely pretrial motions and objections. The waiver provision of R.C.M. 905(e) was based on Rule 12, the purpose of which rule is to encourage parties to litigate efficiently and develop factual records on which appellate courts are able to review allegations of error:

> If [Rule 12's] time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.[37]

"Plain error" is a doctrine for trial errors—those errors made in the heat of litigation which an attorney might overlook. Plain error is simply not appropriate for issues of which the accused is on notice and has time to research and prepare to object.

Applying plain error presents other difficulties. First, it is inconsistent with several rules of evidence. R.C.M. 905(b)(3) and (e) would apply plain error to an accused's failure to timely move to suppress evidence while, consistent with federal practice, an accused's failure to object or move to suppress any confessions or admissions,[38] searches and seizures,[39] and eyewitness identifications[40] "shall constitute waiver." Under the general/specific canon of statutory construction,[41] motions to suppress confessions and admissions, searches and seizures, and eyewitness identification would apply a different standard from other motions to suppress. There does not appear to be a valid basis for treating motions to suppress in different ways.

The 2019 amendment to R.C.M. 905(e) is flawed and should be revised.

Second, appellate courts in the military justice system have shown an inability to apply the plain error standard of review consistently. The CAAF has asserted that the military plain error rule has a higher threshold than does the federal rule.[42] Yet in many cases, the plain error review they employ is little different from providing de novo review, as if the accused had preserved the issue for appeal by timely objecting.[43] Rule 12 now takes the appropriate approach. It recognizes that the failure to timely raise certain issues is actually a time bar, not an issue to be reviewed for waiver or plain error. If the party has good reason for not timely raising the issue, then the court can consider it.

GUIDELINES

What follows is excerpts from the current R.C.M. with modifications to assist readers in understanding the author's recommendations. The modifications follow a basic format:

- Language in regular text is the current language in the R.C.M.
- Language ~~lined out~~ is text the author recommends is deleted
- Language in **red** is text the author recommends is added

RECOMMENDATIONS

The 2019 amendment to R.C.M. 905(e) is flawed and should be revised. In the process, the President should also revise R.C.M. 905(b) to adapt the 2014 amendments made to Rule 12 to military practice to clarify which specific motions, defenses, and objections must be made before pleas are entered.

R.C.M. 905(b) should be amended, as follows:

(b) Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(1) ~~Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, or referral of charges, or in the preliminary hearing~~ A defect in instituting the prosecution, including:

(A) improper venue;
(B) prereferral delay;
(C) a violation of the constitutional right to a speedy trial;
(D) selective or vindictive prosecution;
(E) an error in the preliminary hearing; and
(F) an error in the pretrial advice;

(2) ~~Defense or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which objections shall be resolved by the military judge at any time during the pendency of the proceedings);~~ A defect in the charge sheet, including:

(A) joining two or more offenses in the same specification (duplicity);
(B) charging the same offense in more than one specification (multiplicity);
(C) lack of specificity;
(D) improper joinder; and
(E) failure to state an offense;[44]

(3) ~~Motions to suppress~~ [S]uppression of evidence;

(4) ~~Motions for~~ [D]iscovery under R.C.M. 701 or the production of witnesses or evidence;

(5) ~~Motions for severance of charges or accused;~~

(6) ~~Objections based on~~ [D]enial of request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

R.C.M. 905(e) should be changed as follows:

(e) Effect of failure to raise defenses or objections. Deadline for a pretrial motion; Consequences of failing to timely file.

(1) Setting the deadline. The court may set a reasonable deadline for the parties to make pretrial motions and schedule hearings on such motions. If the court does not set one, the deadline is before the accused enters pleas.

(2) Extending or resetting the deadline. At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) Consequences of not making a timely motion under R.C.M. 905(b). ~~(1) Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver. The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule.~~ If a party does not meet the deadline for raising an R.C.M. 905(b) motion, defense, or objection,

it is untimely. A court is barred from considering such untimely filed motions, defenses, or objections absent the party showing good cause.

(4) Other motions, requests, defenses, or objections, except lack of jurisdiction ~~or failure of a charge to allege an offense,~~ must be raised before the court-martial is adjourned for that case. Failure to raise such other motions, requests, defenses, or objections, shall constitute forfeiture, absent ~~an affirmative waiver~~ plain error.

CONCLUSION

There is no compelling military reason for not adapting the 2014 amendments to Rule 12 to military practice. In adapting Rule 12(c), however, R.C.M. 905(e) should clarify that courts are barred from considering untimely motions, defenses, or objections absent good cause.

ABOUT THE AUTHOR

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ENDNOTES

[1] Manual for Courts-Martial, United States, R.C.M. 905(b) and (e) (2016) [hereinafter MCM].

[2] U.S. Const. art. I, § 8, cl. 14.

[3] 10 U.S.C. § 836(a) (2012).

[4] Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 12, 1980).

[5] *See* MCM, *supra* note 1, Mil. R. Evid. analysis, at 22-1.

[6] *Id.*, R.C.M. analysis, at A21-1 (2016).

[7] *Id.*

[8] Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984), as amended by Exec. Order No. 12,484, 49 Fed. Reg. 28,825 (July 13, 1984).

[9] *See* MCM, *supra* note 1, R.C.M. 905 analysis, at A21-52.

[10] Fed. R. Crim. P. 12(b).

[11] Fed. R. Crim. P. 12(f), Advisory Committee Notes on Rules—1974 Amendments. As part of a general restyling of the rules, this provision was later revised and moved to Fed. R. Crim. P. 12(e). *See* Fed. R. Crim. P. 12, Advisory Committee Notes on Rules—2002 Amendments. In 2014, it was revised again and moved to Fed. R. Crim. P. 12(c). *See* id., 2014 Amendments.

[12] *See*, e.g., United States v. Marshall, 176 F.3d 485 (9th Cir. 1999); United States v. Marrero, 991 F.2d 786 (1st Cir. 1993) (per curiam); United States v. Haas, 986 F.2d 503 (8th Cir. 1993); United States v. Worthington, 698 F.2d 820, 824 (6th Cir. 1983); *but see* United States v. Masters, 976 F.2d 728 (4th Cir. 1992) ("Failure to raise this objection constitutes a waiver of the objection unless the defendant shows actual prejudice.").

[13] Fed. R. Crim. P. 12, *supra* note 11, 2002 Amendments.

[14] *Id.*

[15] United States v. Johnson, 415 F.3d 728, 730 (7th Cir. 2005) (citing United States v. Clarke, 227 F.3d 974, 880–81 (7th Cir. 2000)).

[16] *Id.*

[17] *See*, e.g., United States v. Ponzo, 853 F.3d 558, 574 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 980 (2018); United States v. Augustine, 742 F.3d 1258, 1265 (10th Cir. 2014); United States v. Garcia, 488 F. App'x 804, 809 (5th Cir. 2012); United States v. Ledezma-Dominguez, 471 F. App'x 880 (11th Cir. 2012) (per curiam); United States v. Gonzalez, 472 F. App'x 132, 135 (3d Cir. 2012) ("waived (i.e., completely barred)").

[18] Fed. R. Crim. P. 12(b)(3), *supra* note 11, 2014 Amendments.

[19] Fed. R. Crim. P. 12(b)(3).

[20] Fed. R. Crim. P. 12(b)(3).

[21] Fed. R. Crim. P. 12(b)(3), *supra* note 11, 2014 Amendments.

[22] *See* United States v. Olano, 507 U.S. 725, 732–733 (1993).

[23] United States v. Vonn, 535 U.S. 55, 64 n.6 (2002).

[24] MCM, *supra* note 1, R.C.M. 905(e).

[25] United States v. Inong, 58 M.J. 460, 464 (C.A.A.F. 2003) (quoting United States v. Huffman, 40 M.J. 225, 229 (C.A.A.F. 1994)).

[26] *See*, *e.g.,* United States v. Murray, 25 M.J. 445, 449 (C.M.A. 1988).

[27] *See* United States v. Bradley, 30 M.J. 310–11 (C.M.A. 1990).

[28] *See, e.g.*, United States v. Chapa, 57 M.J. 140, 142 n.4 (C.A.A.F. 2002); United States v. Godshalk, 44 M.J. 487, 490 (C.A.A.F. 1996); United States v. Carroll, 43 M.J. 487, 488 (C.A.A.F. 1996); United States v. Briggs, 42 M.J. 367, 370 (C.A.A.F. 1996); United States v. Green, 37 M.J. 380, 384 n.2 (C.M.A. 1993).

[29] *See, e.g.,* United States v. Rust, 41 M.J. 472, 480 (C.A.A.F. 1995) (concerning whether trial counsel became an "accuser"); United States v. Corcoran, 40 M.J. 478, 485 (C.M.A. 1994) (regarding defects in the pretrial advice, referral, or post-trial recommendation); United States v. McCants, 39 M.J. 91, 93 (C.M.A. 1994).

[30] 77 M.J. 438, 439–443 (C.A.A.F. 2018).

[31] *Id*. at 439.

[32] For example, under the general category "a defect in instituting the prosecution," Fed. R. Crim. P. 12(b)(3)(A) now lists five separate motions or objections:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing.

[33] UCMJ art. 36(a) (2012). The term "practicable" means "reasonably capable of being accomplished; feasible in a particular situation." Black's Law Dictionary 1361 (10th ed. 2014). Therefore, although the President is granted considerable deference, he or she should adopt federal practices, except where there is compelling military reason for not doing so.

[34] Exec. Order No. 13,825, 83 Fed. Reg. 9889, 9984 (Mar. 8 2018) (amending R.C.M. 905(e)(1)(emphasis added)).

[35] Black's, *supra* note 33, at 765; *see* Webster Third International Dictionary 891 (1986).

[36] United States v. Ruiz, 54 M.J. 138, 143 (C.A.A.F. 2000) (quoting United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986)).

[37] United States v. Smith, 866 F.2d 1092, 1097 (9th Cir. 1989) (quoting Davis v. United States, 411 U.S. 233, 241 (1973)).

[38] MCM, *supra* note 1, Mil. R. Evid. 304(f)

[39] *Id.*, Mil. R. Evid. 311(d)(2)(A).

[40] *Id.*, Mil. R. Evid. 321(d)(2).

[41] "If there is a conflict between a general provision and a specific provision, the specific provision prevails." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012).

[42] United States v. Powell, 49 M.J. 460, 465 (C.A.A.F. 1998) (discussing differences between UCMJ art. 59(a) and Fed. R. Crim. P. 52(b)).

[43] *See* Major Terri J. Erisman, *Defining the Obvious: Addressing the Use and Scope of Plain Error*, 61 A.F. L. Rev. 41, 64–70 (2008) (noting the CAAF has not always required the appellant to establish each prong of the plain error standard and refused to adopt the fourth prong of the Supreme Court's plain error analysis—that an appellate court should not correct a plain error unless the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings," Johnson v. United States, 520 U.S. 461, 467 (1997)—provides appellants with no great incentive to timely object).

[44] This change would necessitate amending R.C.M. 907(b)(2)(E).

Administrative Investigations and Nonjudicial Punishment in Joint Environments

BY CAPTAIN BALAJI L. NARAIN & CAPTAIN DUSTIN L. BANKS

Dealing with members of another service can often feel like foreign territory, and getting up to speed with other services' disciplinary rules and regulations can be daunting.

In today's joint environment, each armed service is expected to collaborate with the others to ensure mission success, and this expectation extends to the attorneys. JAGs are trained in the rules and regulations of our respective services and each branch employs its preferred methods and forms for obtaining facts and using those facts to impose discipline. It makes sense that we focus on our service-specific rules at our home stations. Unfortunately, that level of knowledge is insufficient in a joint environment.

As JAGs, we are often tasked to deploy with other services. We cannot always control what rules we have to apply, and we do not always have robust reach-back support to check our work. But what we can count on is that when a service member gets in trouble or when a deployed commander believes that a situation warrants investigation, the JAG is expected to know exactly how to proceed.[1] Dealing with members of another service can often feel like foreign territory, and getting up to speed with other services' disciplinary rules and regulations can be daunting.

Although the Uniform Code of Military Justice is intended to apply across all armed services, each has developed its own tools and procedures for investigating offenses and prosecuting them. There are dedicated agencies for conducting criminal investigations, and JAGs may often advise them. However, this article focuses on two areas where we have experienced an even greater volume of work. It serves as a primer to discuss differences in non-criminal, administrative investigations and non-judicial punishments (NJP) between the Departments of the Air Force, Army, and Navy. As the United States Marine Corps falls under the administra-

tion of the Department of the Navy, Navy regulations on administrative investigations and NJPs also apply to the Marine Corps.

> Although the Uniform Code of Military Justice is intended to apply across all armed services, each has developed its own tools and procedures for investigating offenses and prosecuting them.

While deployed, we have conducted investigations under the rules of the Air Force, Army, and Navy. We collaborated to conduct these investigations together in austere forward locations. Also, we have advised on NJP under the rules of each of the services. Therefore, we appreciate the value of good initial guidance. Administrative investigations do not necessarily lead to NJPs and may result in lesser forms of corrective action, like administrative paperwork. NJPs may also result from criminal investigations that do not result in courts-martial. Although the armed services vary in how they issue and process administrative paperwork, we focus on NJPs because, as the name indicates, they are punitive in nature and are likely to have a more significant impact on a service member than administrative paperwork.

This primer is intended to be an initial reference when conducting investigations or shepherding NJPs in a joint environment with different services. By flagging the most salient distinctions between the services' rules, including collateral administrative regulations, our goal is to help the JAG practitioner keep an eye out for potential pitfalls that could make or break legal sufficiency. This article is not intended to give advice on managing courts-martial, because each combatant command or service may differ on whether or not it implements courts-martial in theater or outside. Our goal for this article is to provide a sufficient starting point, so a JAG from any servicing branch knows where to begin and how to proceed.

ADMINISTRATIVE INVESTIGATIONS

The power to authorize an investigation is inherent in command. An administrative investigation is a tool for commanders to discover the facts of a particular situation. If a commander or JAG believes at the outset that a member's conduct is criminal, then an administrative investigation is less appropriate than an investigation run by a law enforcement agency. But for lesser forms of misconduct, or when a commander does not know that conduct is criminal, the administrative investigation is a useful tool. There can be multiple sub-types of administrative investigations, depending on the circumstances. In this article, we will explore the primary administrative investigation rules used by each service.

> An administrative investigation is a tool for commanders to discover the facts of a particular situation.

It is worth noting at the outset that the different service regulations for investigations apply both domestically and downrange. If a JAG understands how to conduct an administrative investigation under the different services' rules at home, the same procedures apply while deployed. The challenge is the interplay of the different rules in a joint environment. Determining which procedures to use is sometimes a matter of judgment, and if a commander has not issued a directive as to which service's procedures will be used, there are some cues which we found useful. If the subjects in an investigation were all from the same service, we advised the appropriate appointing authority to initiate an investigation using rules, procedures, and format of those members' branch of service. But, if there were multiple subjects involved from different branches, we would not conduct multiple investigations under multiple procedures to reflect each subject's branch of service. Instead, we would recommend that one investigation be conducted, using the procedures and format that would apply to the largest number of subjects.

The remainder of this section will identify and review the administrative investigative tools used in each armed service. It will highlight salient distinctions and identify key references for JAGs.

Air Force

Commander Directed Investigations (CDIs) are a common tool for obtaining facts and evidence in advance of discipline. Air Force regulations direct[2] using specific guidance on how to conduct CDIs.[3]

CDIs must be initiated by a commander[4] who appoints an investigating officer (IO) and a legal advisor to aid the IO. The IO must meet the eligibility criteria to serve as an IO under the guidance contained in the CDI Guide.[5] The attorney advising the IO should start by drafting the appointment letter and allegations to be investigated. The allegations should provide specificity as to what the IO is to investigate. The CDI Guide suggests the allegations be drafted to enable the IO to determine the Who, What, When, Where, and Why (the "5Ws") of the situation.[6]

After the IO consults with the legal advisor, develops a plan for investigation, and crafts questions to ask witnesses, the IO should begin conducting interviews and gathering evidence. The CDI Guide provides template scripts that the IO can read to witnesses, thereby facilitating the interview process.[7] The IO may collect and document interview responses in a summarized statement of testimony, or may collect sworn statements from witnesses on form AF IMT 1168, *Statement of Suspect/Witness/Complainant*.

> One salient difference between the Air Force investigation process and the other services' is the hand-off policy for certain witnesses.

One salient difference between the Air Force investigation process and the other services' is the hand-off policy for certain witnesses. This policy originates in AFI 90-301.[8] When interviewing a distraught witness or the subject or suspect of an investigation, an IO **must make a person-to-person contact**, ensuring that the interviewee is met either by the commander or the commander's designated representative.[9] The intent of this policy is to prevent an emotional or distraught interviewee from subsequently harming himself or herself. To mitigate this risk, the IO arranges for a third party to meet the interviewee after the interview. The other services do not appear to require such a hand-off; however, our experience with the benefits of this policy leads us to suggest that IOs should consider implementing it, even when conducting an investigation under other services' rules.

Once the IO finishes collecting witness statements and other evidence, the IO then prepares findings and recommendations for the appointing authority to review. The CDI Guide provides templates for how the final report should be compiled and presented to the appointing authority.[10] After the IO obtains the necessary independent legal and technical reviews, he or she submits the package to the commander. The commander then documents concurrence or non-concurrence with the findings in a separate memorandum.

Army

The Army also empowers and expects commanders to investigate negative situations within their command. Unlike the Air Force, the Army has promulgated a regulation for administrative investigations—Army Regulation (AR) 15-6—which delineates how an investigation will be conducted and documented.[11] Because the authority for investigation is AR 15-6, the **Army commonly refers to investigations as "15-6s."** As with CDIs, a 15-6 investigation commences when an appointing authority—usually a commander, but not necessarily—determines there is a situation that warrants further examination beyond initial inquiry into the matter.[12] The appointing authority then selects an IO to investigate the problem[13] and appoints the IO and legal advisor through a memorandum.[14] Once appointed, the IO consults with the legal advisor and proceeds to conduct interviews and collect evidence.

The investigation process is akin to the Air Force. But there are some distinctions to bear in mind.

So far, the investigation process is akin to the Air Force. But there are some distinctions to bear in mind. First is documentation. The Army requires that the investigation be documented on the 1574-series of forms.[15] The investigation approval authority—often, but not always, the appointing authority—documents whether he or she concurs with the IO's findings and recommendations.[16] When obtaining witness testimony, the IO may summarize witness responses or obtain sworn statements on DA Form 2823, akin to AF 1168.

A second important distinction is that the Army gives field grade officer (FGO) subjects a chance to review and rebut adverse material. If the IO determines there is evidence or findings adverse to an FGO, the FGO must be afforded at least 10 business days to respond before the investigation package is provided to the approval authority for review.[17] This practice does not appear in the Air Force or Navy/Marine Corps which rather allow the subject of an investigation to rebut an investigation's findings after corrective action is initiated.

Navy/Marine Corps

Much like its sister services, the Navy has formally codified guidance applicable to its JAG Corps. These comprehensive instructions, detailed in the Manual of the Judge Advocate General (**JAGMAN**), **JAG Instruction 5800.7F**,[18] specify how to conduct and advise upon administrative investigations.[19] The JAGMAN distinguishes between preliminary inquiries conducted by a commander or designee, and a formal commander-directed administrative investigation.[20]

An administrative investigation is initiated when the commander issues an appointment memorandum, known as a convening order.[21] Once appointed, the IO interviews witnesses and collects evidence, resembling the Air Force and Army investigative processes. Like the CDI Guide and AR 15-6, the JAGMAN prescribes a format in which investigation reports should be documented; like the CDI Guide, the JAGMAN contemplates that the report will be submitted as a memorandum.[22]

Despite the similarities in the investigatory processes between the services, there are a few distinctions to bear in mind regarding Navy JAGMAN investigations. First, unlike the CDI Guide or AR 15-6, the JAGMAN does not explicitly require the IO submit a complete report for independent legal review prior to command action.[23] Additionally, the JAGMAN requires that a General Court-Martial Convening Authority (GCMCA) superior to the convening commander review every command investigation unless specified criteria are met.[24] Third, a JAGMAN IO may take sworn statements when interviewing witnesses, but need not use any particular form.[25]

AFTER THE INVESTIGATION

After an administrative investigation closes, the appropriate decision-maker must decide what to do with the facts obtained. If the facts reveal a member committed minor misconduct that does not violate the UCMJ, then administrative paperwork might suffice. In the Air Force and Army such paperwork can include letters of counseling, admonition, or reprimand.[26] In the Navy/Marine Corps, supervisors may issue nonpunitive letters of caution (NPLOCs).[27] However, in cases where a member has violated the UCMJ, but might not warrant a court-martial, the administrative investigation could lead to NJP.

NONJUDICIAL PUNISHMENT

Whether at home or deployed, a military justice attorney needs to work hand-in-hand with commanders to stay ahead of potential disciplinary problems. After consulting on whether NJP is appropriate in a particular situation, the attorney must advise the commander on the correct process. But the correct process will depend on the branch of service of a military member. Individuals are entitled to a baseline of procedural rights codified in statute[28] and the Manual for Courts-Martial (MCM).[29] Furthermore, per the MCM, NJP proceedings are administered in accordance with the rules and regulations of the accused's service.[30]

This is particularly important in a deployed, joint environment where the accused and commander might belong to different services. As such, the attorney needs to plan for the challenges of offering and imposing NJPs under different services' rules to achieve a smooth process.

> NJP proceedings are administered in accordance with the rules and regulations of the accused's service. This is particularly important in a deployed, joint environment where the accused and commander might belong to different services.

This fluency includes knowing who can even offer NJP and who is subject to NJP. NJP authority is limited to commanders or, if service regulations permit, officers in charge.[31] By statute, NJP authorities can only offer NJP to members of their command.[32] In many joint environments, there will be a commanding officer with a staff of joint directorates. Unless authorized by regulation, joint directors in charge of sections cannot offer NJP to subordinates. Because the NJP authority will most often be someone in a position of command, for brevity, we refer to commanders when discussing who will offer and impose NJP. But a deployed JAG will have to determine who else, if anyone, can exercise NJP authority within the joint command.

> Before advising on NJP or forwarding an appeal, a JAG should consult military justice instructions issued by the joint command and by superior commands.

In all cases, in addition to the regulations discussed below, before advising on NJP or forwarding an appeal, a JAG should consult military justice instructions issued by the joint command and by superior commands (such as a Combatant Command).[33] Such instructions can provide guidance on whether NJP authority is withheld (such as to impose NJP on personnel above a certain grade) or on who would be the NJP appeal authority.

Air Force

The Air Force instruction governing NJP is **AFI 51-202**.[34] The charges, offer, acceptance, and punishments pertaining to NJP are documented on AF Form 3070, which is further subdivided into forms A, B, or C, depending on the grade of the active duty accused. After a commander offers NJP to a service member, the subject has three duty days to make key decisions on whether to: accept NJP proceedings, consult with counsel, submit matters to the commander, or request a personal appearance. After the subject makes his or her elections—if he or she chooses to accept NJP proceedings—and if the commander imposes punishment, the subject has five calendar days to decide whether or not to appeal.

> Unlike the Army and Navy standards of proof, there is no specific standard of proof for Air Force NJPs, although there is an implicit standard.

There are important differences between Air Force and sister services' NJP proceedings. For example, Air Force personnel in the grades of E-7 to E-9 could be reduced in grade, depending on the grade of the imposing commander.[35] Additionally, unlike the Army and Navy standards of proof, there is no specific standard of proof for Air Force NJPs, although there is an implicit standard. That is, an Airman subject could reject the offer of NJP and demand trial by court-martial, creating an implicit requirement that the evidence provides proof beyond a reasonable doubt before proceeding.[36]

In a joint environment, the accused's commander might not be an Air Force officer. Regardless, joint forces commanders may impose NJP on Airmen.[37] But, the imposing commander's branch of service can affect special rules governing collateral administrative actions after NJP. For example, if

a joint forces commander belongs to a sister service and imposes NJP on Airmen, that commander would forward the NJP paperwork to a superior Air Force commander to file in a UIF.[38] If there is no superior Air Force commander in the joint command, the NJP must be forwarded to the next superior Air Force GCMCA to decide whether to open a UIF and file the NJP paperwork.[39]

Army

Army military justice regulation, **AR 27-10**, provides guidance and instruction on the NJP process. This regulation prescribes two different formats for NJP proceedings: summarized and formal.[40] The primary differences between the two formats relate to documentation, punishment limitations, notification and decision-making, and access to an attorney. In summarized proceedings, the charges and specifications, along with all parties' decisions, are captured on DA Form 2627-1. The commander imposing NJP first notifies the accused soldier of the charged offenses and the soldier's rights.[41] The commander then grants the soldier a reasonable time—usually 24 hours—in which to decide whether to accept NJP or demand trial by court-martial.[42] In summarized proceedings, the accused soldier is not guaranteed the right to consult with legally qualified counsel during the decision period.[43]

Formal proceedings are documented on a **DA Form 2627**. As with summarized proceedings, formal proceedings entail notifying the accused of the charges against him or her as well as his or her rights under AR 27-10.[44] After notification, the accused is entitled to a reasonable amount of time in which to make relevant decisions—such as whether to accept NJP proceedings or to demand trial by court-martial. For formal proceedings, 48 hours are customarily allowed.[45] Importantly, during formal proceedings, because the potential punishments are more severe than in summarized proceedings,[46] the accused must be informed of the right to consult with counsel and counsel's location.[47] To facilitate proceedings, the Army provides a script for commanders to use throughout the NJP process.[48]

Attorneys must pay close attention to the idiosyncrasies of Army NJPs

In both formats of proceedings, the imposing commander must employ a beyond a reasonable doubt standard.[49] Additionally, both formats allow the accused to appeal imposed punishments within a reasonable time.[50] If the accused chooses to appeal, then he or she must provide any additional materials for the appeal within five calendar days after the imposition of punishment.[51]

Attorneys must pay close attention to the idiosyncrasies of Army NJPs. First, as with AFI 51-202, AR 27-10 specifies punishments commanders may impose in summarized[52] and formal proceedings.[53] However, unlike the Air Force, Army regulations do not permit commanders to reduce soldiers in the grade of E-7 or above at NJP, regardless of the grade of the commander.[54]

There are Army-specific administrative effects collateral to the NJP process. When a commander initiates NJP against an accused, the unit must also move to suspend any favorable personnel actions for the accused.[55] The relevant document, known as a **Flag**, prevents the subject from being transferred to another unit if initiated because of NJP proceedings.[56] The purpose of the Flag is to ensure the unit does not lose the soldier due to permanent change of station when a military justice action is ongoing. However, the Flag also means the unit cannot move the soldier until the military justice action (to include any NJP appeal) is complete, except in limited circumstances.[57] Flags fall within the remit of the Army S-1/G-1 office or the joint command's J-1 office. It is important for the attorney to advise the commander and S-1/G-1 offices not to move the soldier from the deployed environment until the appeal process is complete or the requirements in **AR 600-8-2** are satisfied.

Navy/Marine Corps

The Navy and Marine Corps rules for NJPs—colloquially known as **Captain's or Admiral's Mast** in the Navy and **Office Hours** in the Marine Corps—are also found in the JAGMAN.[58] As noted above, the Marine Corps falls under the Navy; consequently, Navy regulations apply to the Navy and the Marine Corps. The JAGMAN recognizes differences between the two services and articulates where different rules apply to each.[59] Once a commander reviews the evidence and decides to offer NJP, he or she must first notify the accused of all applicable rights.[60]

At this stage, the Navy/Marine Corps NJP process differs from the other services. First, an accused cannot refuse the offer of NJP if he or she is attached to or embarked on a vessel.[61] Next, according to the JAGMAN, "[t]here is no right for an accused to consult with counsel prior to [NJP]."[62] However, if the accused is not attached to or embarked in a vessel at the time of imposition of NJP, and the accused is not afforded the right to consult with an attorney, then the record of NJP cannot later be used as aggravating evidence in a court-martial for other offenses.[63] Conversely, if the accused is not attached to or embarked in a vessel at the time of imposition of NJP and is afforded a right to consult with independent counsel prior to imposition of NJP, the NJP can later be used as aggravating evidence.[64] If the accused is offered the right to speak with counsel and elects to do so before making decisions relevant to the NJP process, the process pauses until the accused has had a "reasonable" time to consult with his or her attorney.[65] Reasonableness varies depending on location and availability of the defense counsel; however, based on conversations with Navy JAGs, we have found it is customary to wait 48 hours. The forms for NJP proceedings are appendices to the JAGMAN. The appropriate form will depend on whether or not the accused is attached to or embarked on a vessel, and whether he or she is afforded the right to consult with an attorney prior to imposing NJP.[66]

> Unlike the Army and Air Force, the standard for finding guilt in the Navy is preponderance of evidence.

After the accused is notified of his or her rights, and before the commander imposes punishment, the accused may request a personal hearing before the commander, which is granted "except when appearance is prevented by the unavailability of the [NJP] authority or by extraordinary circumstances."[67] After a personal hearing and reviewing all evidence in the case, the commander determines punishment. Unlike the Army and Air Force, the standard for finding guilt in the Navy is preponderance of evidence.[68] This different standard is important to bear in mind if individuals from different services face NJP for similar offenses.

In terms of punishment, there are salient distinctions between the Navy and other services. No accused may be reduced by more than one grade, and Navy personnel at E-7 or above and Marine Corps personnel at E-6 or above may not be reduced in grade at NJP.[69]

Finally, as with the other services, after imposition of punishment the commander informs the accused of his or her rights to appeal and must document this briefing.[70] The officer who imposed the punishment submits the contents of the appeal and NJP to the superior authority on appeal via a forwarding endorsement.[71] Specific contents of the forwarding endorsement are detailed in the JAGMAN. When NJP is imposed within a joint command or unit and is imposed by a joint commander, in the case of Navy personnel, "the appeal shall be made to the nearest Navy Region Commander or to a subordinate GCMCA designated by the Region Commander for this purpose."[72] In the case of Marine Corps personnel at a joint command, "an appeal from NJP, in the absence of specific direction to the contrary by the Commandant, shall be made to the Marine Corps general officer in command geographically nearest and superior in rank to the officer who imposed the punishment."[73]

CONCLUSION

Ultimately, the goal of any administrative investigation is to figure out the facts: what happened? This goal remains constant, regardless of who is conducting the investigation or who is being investigated. The goal of NJP is to give commanders a flexible tool to maintain good order and discipline. Each service provides its own ways and means of discerning and then applying facts to promote good order and discipline. By first acknowledging these goals and realizing the basic similarities in investigation and NJP processes between the services, the deployed attorney can avoid being overwhelmed by the differences. If the JAG has a solid understanding of the principles, rules, and procedures under one service, then it is relatively straightforward to apply that understanding to the sister services. The challenge occurs in knowing where to look to obtain a fuller site picture of each service's idiosyncratic rules.

Ultimately, the goal of any administrative investigation is to figure out the facts: what happened?

When a commander confronts a military justice issue, he or she expects the JAG to know how to proceed and to give accurate advice. This is an opportunity for a military justice attorney to stand out in a joint environment by demonstrating familiarity and fluency in each service's military justice regulations. In doing so, JAGs can mitigate the challenges of maintaining good order and discipline and can help their commanders more effectively maintain mission focus.

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ENDNOTES

[1] Pursuant to joint doctrine, the staff judge advocate is expected to support both investigations and military justice practice at a joint force command, including joint task forces. *See* Joint Chiefs of Staff, Joint Pub. 1-04, Legal Support to Military Operations III-2 (2 Aug. 2016) [hereinafter JP 1-04]. The doctrine makes no exceptions based on the service of the judge advocate, but instead indicates that the attorneys are expected to provide this support.

[2] U.S. Dep't of Air Force, Instr. 90-301, Inspector General Complaints Resolution para. 1.43.2.2 (28 Dec. 2018) [hereinafter AFI 90-301].

[3] U.S. Dep't of Air Force, Secretary of the Air Force Office of the Inspector General, Commander Directed Investigation (CDI) Guide (1 Jun. 2018) [hereinafter CDI Guide].

[4] Command authority may only be exercised by commissioned officers in the Air Force. U.S. Dep't of Air Force, Instr. 51509, Appointment To and Assumption Of Command paras. 3.1, 3.3 (14 Jan. 2019) (hereinafter AFI 51-509). Enlisted personnel are not eligible to exercise command authority. *Id.* para. 3.5. Additionally, civilians can lead certain units in the Air Force, and can supervise and direct military and civilian personnel below them; however, civilians cannot exercise command authority over any Air Force unit or any Air Force personnel in any duty status. *Id.* para. 3.6. Civilians in charge of a unit will typically be titled as directors. *Id.* para 3.6.1. Like unit commanders, civilian unit directors may also investigate issues within their unit, and will also follow the CDI Guide.

[5] CDI Guide, *supra* note 3, para. 3.3.

[6] *Id.*, Chapter 4.

[7] *Id.*, Attachment 14.

[8] AFI 90-301, *supra* note 2, para. 4.17.

[9] *Id.*

[10] CDI Guide, *supra* note 3, Attachment 17.

[11] U.S. Dep't of Army, Reg. 15-6, Procedures for Administrative Investigations and Boards of Officers (1 Apr. 2016) [hereinafter AR 15-6].

[12] *Id.*, paras. 1-8, 2-1(b).

[13] *Id.*, para. 2-3 on who may be appointed as an IO. Absent military exigencies, an IO must be senior in rank to all individuals whose conduct is investigated. *See id.*, para. 2-3(f).

[14] *Id.*, paras. 2-2, 2-6.

[15] There are two DA Forms 1574, one for documenting investigations by an IO and the other for documenting investigations by boards of officers. The JAG should counsel the IO to use DA Form 1574-1, *Report of Proceedings by Investigating Officer*.

[16] AR 15-6, para. 2-8(b).

[17] *Id.*, paras. 2-8(c), 5-4.

[18] U.S. Dep't of Navy, JAGINST 5800.7F, Manual of the Judge Advocate General CH-1 (JAGMAN) (1 Jan. 2019) [hereinafter JAGMAN]. The JAGMAN specifically encompasses the United States Marine Corps as well, stating "The words 'Navy' and 'Naval' as used in this Manual include the Marine Corps, except where the context indicates differently." *Id.* at i.

[19] *Id.*, Chapter II.

[20] *Id.*, sec. 0209. The JAGMAN also creates two additional types of commander-directed inquiries: litigation-report investigations and courts/boards of inquiry. *See id.*, §§ 0210-0211. However, we focus exclusively on the first class of investigations; the JAGMAN states, with respect to command investigations, that "[m]ost investigations will be of this nature." *Id.* sec. 0209.

[21] *Id.*, sec. 0206, App. A-2-d.

[22] *Id.*, sec. 0208, App. A-2-e.

[23] Compare JAGMAN sec. 0209 and AR 15-6 para. 2-7.

[24] JAGMAN, *supra* note 18, sec. 0209(g).

[25] *Id.* sec. 0209(d)(2). In practice, statements can be collected on form OPNAV 5527/2, *Voluntary Statement*.

[26] U.S. Dep't of Air Force, Instr. 36-2907, Unfavorable Information File (UIF) Program ch. 4 (26 Nov. 2014) [hereinafter AFI 36-2907]; U.S. Dep't of Army, Reg. 600-20, Army Command Policy (6 Nov. 2014).

[27] JAGMAN, *supra* note 18, sec. 0105. Unlike the Army and Air Force administrative letters, the Navy NPLOC does not provide the recipient the opportunity to respond to the letter. *Id.* at App. A-1-a.

[28] 10 U.S.C. § 815.

[29] Manual for Courts-Martial, United States pt. V (2019) [hereinafter 2019 MCM].

[30] *Id.*, para. 1(h). The NJP process does not preclude the use of administrative measures to promote good order and discipline. *See id.*, para. 1(g).

[31] *Id.*, para. 2(a)-(b). The 2019 MCM also notes that GCMCAs may delegate NJP duties to a principal assistant, if service regulations allow. *See id.*, para. 2(c).

[32] 10 U.S.C. § 815(b).

[33] Unfortunately, we have found no central repository of combatant command or joint forces command military justice instructions. Upon entering an area of responsibility, we recommend that a deployed JAG liaise with a higher command's legal office to obtain any such instructions.

[34] U.S. Dep't of Air Force, Instr. 51-202, Nonjudicial Punishment (6 Mar. 2019) [hereinafter AFI 51-202].

[35] *Id.*, Table 3.1, note 2.

[36] *Id.*, para. 3.4. This implicit standard exists in all environments, not only deployed or joint environments. But, it is in joint environments that a JAG might encounter situations with subjects from different services, and so he or she must be cognizant of the different standards of proof for Navy and Army NJPs.

[37] *Id.*, paras. 2.5-2.7. "The joint force commander has authority to impose NJP on Air Force members assigned or attached to the command, regardless of the commander's parent service, unless such authority is withheld by a superior joint commander." *Id.* para. 2.5.

[38] *Id.*, para. 2.4.3.; AFI 36-2907, *supra* note 26, paras. 2.1.7, 2.2.7.

[39] AFI 51-202, *supra* note 34. Although we do not focus on administrative paperwork, such as letters of reprimand, these documents can also correct deficient behavior. *See* AFI 36-2907, paras. 2.1.5, 2.2.5 on UIFs in a joint environment.

[40] U.S. Dep't of Army, Interim Reg. 27-10, Military Justice paras. 3-16 through 3-18 (1 Jan. 2019) [hereinafter AR 27-10].

[41] *Id.*, para. 3-16(b).

[42] *Id.*, para. 3-16(c).

[43] *Id.*

[44] *Id.*, para. 3-18(a)-(e).

[45] *Id.*, para. 3-18(f).

[46] In summarized proceedings, an accused soldier may be punished with extra duties for 14 days, restriction for 14 days, oral reprimand or admonition, or any combination of the foregoing. *See id.*, para. 3-16(a). Punishments for formal proceedings can vary, based on the grade of the accused and the grade of the imposing commander. Generally, beyond the punishments that can be imposed at summarized proceedings, in formal proceedings soldiers are potentially also subject to correctional custody, reduction in grade, and forfeiture of some pay. *See id.*, Table 3-1, *Maximum punishments for enlisted members and commissioned officers.*

[47] *Id.*, para. 3-18(c).

[48] *Id.*, Appendix B.

[49] *Id.*, paras. 3-16(d)(4), 3-18(l).

[50] *Id.*, para. 3-29.

[51] *Id.* "If, at the time of imposition of punishment, the soldier indicates a desire not to appeal, the superior authority may reject a subsequent election to appeal, even though it is made within the 5-day period." *Id.*, para. 3-29(b).

[52] *Id.*, para. 3-16(a).

[53] *Id.*, para. 3-19(b), Table 3-1.

[54] *Id.*

[55] U.S. Dep't of Army, Reg. 600-8-2, Suspension of Favorable Personnel Actions (Flag) para. 2-2(c) (11 May 2016) [hereinafter AR 600-8-2]. The regulation does not explicitly define favorable personnel actions; instead examples of favorable actions come from the definition of unfavorable status, and may include permanent or temporary movement or receiving an award or decoration. *Id.* at 31.

[56] *Id.*, para 2-2(c).

[57] *Id.*, paras. 2-2, 2-8.

[58] JAGMAN, *supra* note 18, Chapter I, Part B.

[59] *Id.* at i.

[60] *Id.*, sec. 0109(a).

[61] *Id.*, sec. 0108(a). However, the accused cannot be attached to a vessel solely for the purpose of preventing him or her from demanding trial by court-martial in lieu of NJP.

[62] *Id.,* sec. 0109(a)(1).

[63] *Id.*, sec. 0109(c).

[64] *Id.*, sec. 0109(d). This same section provides guidance on what communication between the accused and counsel suffices.

[65] *Id.*

[66] *Id.* at App. A-1-b, A-1-c, A-1-d.

[67] *Id.*, sec. 0110(a). A guide for conducting this hearing may be found at Appendix A-1-f to the JAGMAN.

[68] *Id.*, sec. 0110(b).

[69] *Id.*, sec. 0111(e).

[70] *Id.*, at App. A-1-f.

[71] *Id.*, at sec. 0116(c)

[72] *Id.,* at sec. 0117(c)

[73] *Id.*

CULTURE WARS

THE CLASH BETWEEN RELIGION AND THE RIGHTS OF SAME-SEX MEMBERS IN THE UNITED STATES AIR FORCE

BY MR. THOMAS G. BECKER, COL (RET), USAF

In kinetic wars, the Air Force has weapon systems at its disposal. In culture wars, we have the law. We must use it correctly.

The Air Force is used to fighting kinetic wars. We're pretty good at it. We're maybe not so good, however, at culture wars. The most recent example of this is the April 2018 decision to reverse action against Colonel Leland Bohannon for his refusal, on religious grounds, to sign a certificate of appreciation for the spouse of a retiring member of his command.

Colonel Bohannon's reason? The spouse was the same sex as the retiree. In effectively endorsing Colonel Bohannon's action, this decision ran counter to the Air Force's own instruction and controlling case law, and puts Air Force commanders and legal practitioners in a difficult position for future cases. Recognizing no one can put the proverbial toothpaste back in the tube, my goal in writing this article is to articulate the hope that this case won't be used as precedent for wholesale legitimization of "religious freedom" as a stalking horse for discrimination that would otherwise be unlawful. In kinetic wars, the Air Force has weapon systems at its disposal. In culture wars, we have the law. We must use it correctly.

WHAT HAPPENED WAS…

The media accounts of the events surrounding Colonel Bohannon's decision not to sign the certificate of appreciation for his retiring noncommissioned officer's (NCO) spouse aren't clear. After consulting several sources, this is my understanding of what happened.

Colonel Bohannon considered his signature on the certificate would be an endorsement of same-sex marriage in opposition to his Christian beliefs.

A few hours before the retirement ceremony at issue, Colonel Bohannon was presented with the spouse appreciation certificate for signature. Colonel Bohannon considered his signature on the certificate would be an endorsement of same-sex marriage in opposition to his Christian beliefs. As Commander of the Air Force Inspection Agency, Colonel

Bohannon's immediate superior was The Inspector General, U.S. Air Force. He called the Deputy Inspector General and informed him of his decision not to sign the certificate. The Deputy Inspector General asked whether Colonel Bohannon would sign if he were ordered to do so. Colonel Bohannon replied he would not. The Deputy Inspector General then said he would sign the certificate in Colonel Bohannon's stead.

All this happened on such short notice that the Deputy Inspector General was unable to sign a certificate and transmit it in time. So, at the ceremony—which Colonel Bohannon did not attend—the retiring NCO's spouse received a certificate without anyone's signature.

At some point, Colonel Bohannon sought advice from a chaplain, who advised him to request a religious accommodation under **Department of Defense Instruction (DoDI) 1300.17**. Colonel Bohannon did so, but after he had already decided not to sign the certificate and had informed the Deputy Inspector General he wouldn't sign even if ordered. It's unclear what purpose the request for accommodation served other than seeking *post hoc* approval of Colonel Bohannon's decision. In any case, the accommodation request didn't reach The Inspector General until after the retirement ceremony was over. Because the request was moot, The Inspector General returned it with no action.

At some point after the ceremony, Colonel Bohannon explained to the retiree why he didn't sign the certificate. While this may have been a well-intentioned gesture, its effect was the opposite and virtually guaranteed a formal complaint.

The resulting discrimination complaint was found to be substantiated, the report noting that, while Colonel Bohannon may have been expressing his religious beliefs, he was still unlawfully discriminating against the NCO and his spouse on the basis of sexual orientation. The Inspector General suspended Colonel Bohannon from command, and issued an adverse Promotion Recommendation Form (PRF) to Colonel Bohannon's upcoming promotion board for brigadier general.

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Colonel Bohannon appealed his PRF to the Air Force Board for Correction of Military Records (AFBCMR),[1] arguing his decision was a protected expression of his religious beliefs and, accordingly, the adverse actions against him were an injustice. AFBCMR agreed and, pursuant to authority delegated by Act of Congress and Air Force Instruction (AFI) 36-2603, the Director of the Air Force Review Boards Agency granted Colonel Bohannon relief on behalf of the Secretary of the Air Force.[2] Notwithstanding these delegations, the Secretary of the Air Force has plenary authority to overturn this decision.[3] She did not, and the relief granted to Colonel Bohannon stands.[4]

Following the AFBCMR decision, the Secretary sent a letter in response to a Congressional inquiry on Colonel Bohannon's behalf. In her reply to the Member of Congress, the Secretary said, as reported in ***Air Force Times***, "the director [of the Air Force Review Board Agency] concluded Colonel Bohannon had the right to exercise his sincerely held religious beliefs and did not unlawfully discriminate when he declined to sign the certificate of appreciation for the same-sex spouse of an airman in his command," and the Air Force's duty to treat people fairly without discrimination on the basis of sexual orientation was met "by having a more senior officer sign the certificate."[5] The Secretary's letter did not mention the certificate was unsigned at the time of the ceremony. Although the letter said the decision "applied current law and policy,"[6] it did not cite any of that law or policy, or explain the legal reasoning behind the conclusions that Colonel Bohannon had a right to refuse to sign and, in doing so, did not commit an act of prohibited discrimination.

THE LAW

There are two areas of law in play here that are important for today's practitioners. First, discrimination law: specifically, is discrimination based on sexual orientation unlawful in the Air Force? Second, religious accommodation law: that is, did Colonel Bohannon have a legal right to use religion as a reason to refuse to sign the appreciation certificate? The answers are, respectively, yes and no. With all due respect to those involved, the AFBCMR decision and the Secretary's failure to overturn it were misapplications of law and policy.

SEXUAL ORIENTATION AS THE BASIS OF UNLAWFUL DISCRIMINATION

The issue of whether **Title VII of the Civil Rights Act of 1964**[7] includes sexual orientation when it condemns discrimination on the basis of "sex" has been, and will continue to be, before the courts.[8] The Supreme Court has yet to rule whether straight-up discrimination based on sexual orientation violates Title VII. No doubt the Court will eventually engage on this issue. This litigation, however, is irrelevant to Colonel Bohannon's case. That's because the Secretary of the Air Force has expressly decided **discrimination based on "sexual orientation" is unlawful** in the Air Force.[9] And before someone opines that this is based on an Obama Administration interpretation of Title VII, it is noteworthy that the Air Force Guidance Memorandum implementing this decision and its reissuance are dated after the current administration began. Accordingly, one would infer that no change is in the offing. Regardless, there's no question this was the Air Force instruction at the time of Colonel Bohannon's actions.[10]

The Secretary's conclusion that there was no discrimination because Colonel Bohannon's superior, after the retirement ceremony, replaced the unsigned spouse certificate with a signed one is unsupportable. The Secretary's instruction on the subject is written in active voice, not passive—"It is against Air Force policy for [an] Airman, military or civilian, to unlawfully discriminate against…another Airman on the basis of…sex (including…sexual orientation)."[11] The legal duty of nondiscrimination belongs to every Airman, not the "Air Force." Was Governor Orval Faubus innocent of unlawful discrimination in 1957, even though he deployed the Arkansas National Guard to prevent racial integration of Little Rock Central High School in defiance of a court order, just because President Eisenhower federalized the Guard and ordered them back to their barracks? Would anyone argue that, because the black students got to go to school, there was no "discrimination?" Do we give a pass to Alabama's then-Chief Justice Roy Moore for exceeding his lawful authority in ordering the state's probate judges to defy the **U.S. Supreme Court's *Obergefell***[12] decision legalizing same-sex marriage nationwide just because most of the probate judges ignored him? Would anyone say that gay couples in Alabama got married, so there really was no harm for which Moore was accountable?

RELIGIOUS ACCOMMODATION LAW

In ***Employment Division v. Smith***,[13] the Supreme Court held the First Amendment's Free Expression Clause[14] may not be invoked to evade the effect of a "neutral, generally applicable regulatory law."[15] Anti-discrimination regulations certainly qualify as such, and the Supreme Court's recent ***Masterpiece Cakeshop*** decision hasn't changed that.[16] The same is true with dereliction of duty and conduct unbecoming an officer under the Uniform Code of Military Justice.[17] So, when Colonel Bohannon or his surrogates talk about his "Constitutional" right for free expression that trumps everything else, they're off the mark, as a matter of law.

Any right to religious accommodation Colonel Bohannon has is rooted in statute, not the Constitution. The Religious Freedom Restoration Act (RFRA),[18] which Congress passed in response to *Employment Division v. Smith*, states:

> In general. Government shall not ***substantially burden*** a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> **Exception.** Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—is in furtherance of a compelling government interest; and is the least re-

strictive means of furthering that compelling governmental interest.[19]

With RFRA, Congress has ***not*** given *carte blanche* to individuals to require the United States to demonstrate a compelling interest every time a law of general application offends someone's religious sensibilities. RFRA's strict scrutiny test is only invoked when governmental action puts a "substantial burden" on someone's exercise of religion.

"SUBSTANTIAL BURDEN"… WHAT IT IS. AND ISN'T

In the Supreme Court's famous ***Hobby Lobby*** case,[20] the Court held a Department of Health and Human Services (HHS) regulation, which mandated inclusion of contraceptive methods in the "preventive care and screenings" requirement of the Patient Protection and Affordable Care Act of 2010,[21] violated RFRA in the case of closely-held corporations whose owners objected on religious grounds. That the HHS regulation imposed a "substantial burden" was not a serious issue; the question was whether a corporation like Hobby Lobby or the other plaintiffs—as opposed to human beings—have religious beliefs that can be substantially burdened. A majority of the Court said it can, at least in the case of a closely-held corporation. Notwithstanding, the Court's majority opinion provides a clear statement of what constitutes a "substantial burden" under RFRA when we're talking about acts by others to which a protagonist objects: "… a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of *enabling or facilitating* the commission of an immoral act *by another*."[22]

"Substantial burden" comes in when someone is required to do something that "enables or facilitates" someone else to do the act which the first someone finds religiously objectionable.

This is the critical point distinguishing *Hobby Lobby* and Colonel Bohannon's actions from the more common case under RFRA, where the religious nature of the protagonist's *own actions* are in issue—either he wants to do something of religious significance that the United States says he can't do, or she wants to refrain from doing something of religious significance that the United States says she must do.[23] In cases like *Hobby Lobby*, the "substantial burden" comes in when someone is required to do something that "enables or facilitates" *someone else to do the act* which the first someone finds religiously objectionable. In the case of Colonel Bohannon's retiree, that ship had sailed—the marriage that Colonel Bohannon disapproved of was already in existence. A signature on a certificate of appreciation for his Airman's spouse no more "enabled" or "facilitated" that marriage than would the act of eating a handful of mints left over from the wedding reception.

The most we can say about Colonel Bohannon's refusal to sign the spouse appreciation certificate is it was "religiously motivated," which the Court of Appeals for the Armed Forces (CAAF) has held does not make out a *prima facie* case under RFRA requiring strict scrutiny. ***United States v. Sterling*** [24] involved a dispute between a junior enlisted Marine and her supervisor over the former's work performance. Lance Corporal Sterling thought her supervisor was "picking on" her and, in response, posted copies of a Bible verse (although not identifying it as scripture on the postings) facing outward from three places inside her work station so passers-by—in particular, her supervisor—could read them. The supervisor told Sterling to take them down. She did not. The supervisor then removed them. Sterling replaced them. These incidents, plus other disobedience, resulted in a special court-martial. During the trial, for the first time, Sterling identified the postings as scripture and claimed religious accommodation as a defense to the specifications related to the postings. She claimed the postings were free expression of her religion and cited DoDI 1300.17, which implements RFRA in the military. Lance Corporal Sterling was convicted. Her conviction and sentence were affirmed by the Navy and Marine Corps Court of Criminal Appeals. She then appealed to CAAF, asserting RFRA provided a defense to the pertinent charges.

CAAF rejected Lance Corporal Sterling's arguments, holding that Sterling did not make out a *prima facie* case for religious accommodation under RFRA and DoDI 1300.17. The court held that, on the facts presented, the government did not impose a "substantial burden" on Sterling's free exercise of religion. Key portions of the opinion follow:

> We decline Appellant's invitation to conclude that any interference at all with a religiously motivated action constitutes a substantial burden, particularly where the claimant did not bother to either inform the government that the action was religious or seek an available accommodation.[25]
>
> [N]o court interpreting RFRA has seemed that *any* interference with or limitation upon a religious conduct is substantial interference with the exercise of religion. Instead,…courts have focused on the subjective importance of the conduct to the person's religion, as well as on "whether the regulation at issue 'force[d claimants] to engage in conduct that their religion forbids or …prevents them from engaging in conduct their religion requires.'"[26]
>
> * * * *
>
> [G]overnment practice that offends religious sensibilities but does not force the claimant to act contrary to her beliefs does not constitute a substantial burden.[27]

In a nutshell, *Sterling* tells us that, if an action is not identified as religiously motivated or if there's no accommodation requested, this is an open invitation for a military supervisor to conclude there has been no substantial burden placed on someone's free exercise. But even if the religious motivation is apparent and a member requests accommodation, a supervisor does not have to conduct the strict scrutiny required by RFRA and DoDI 1300.17 in the absence of a restriction that forces the member to engage personally in something forbidden by their religion or prevents them from doing something required by their faith. Put another way, offense to religious sensibility isn't enough to mandate strict scrutiny.[28]

OF SENSE AND SENSIBILITIES[29]…AND PRECEDENT

No one required Colonel Bohannon to officiate at any same-sex wedding. No one asked him to sign any marriage certificate as a witness. No one even asked him to grant his Airman leave so the Airman could get married. No objective reading of the Bohannon case reveals anything more than Colonel Bohannon's religious sensibilities were offended by signing a paper that acknowledged his Airman's already-existing marriage. Religion-based offense is not enough to legally justify an act of discrimination that's otherwise barred by Air Force instruction. Practitioners, beware: the impact of this case can be far-reaching; the AFBCMR decision and the Secretary's failure to overturn it open the door for more religious rationalization of discrimination.

Practitioners, beware: the impact of this case can be far-reaching; the AFBCMR decision and the Secretary's failure to overturn it open the door for more religious rationalization of discrimination.

Much has been made by some that the Bohannon decision is not "judicial precedent."[30] True, but irrelevant. The AFBCMR and Secretary's decisions are ***executive*** precedent. Unless the Air Force is prepared to act arbitrarily and capriciously, which it may not lawfully do,[31] we're stuck with the Bohannon decision as a marker for all future objections to routine acts that don't require the actor to do anything contrary to religious faith but still might offend religious sensibilities. As noted by Justice Kennedy in his *Masterpiece Cakeshop* opinion, the "possibilities seem all but endless."[32] Let's take a look at just a few in the military context:

- A commander refuses, on religious grounds, to appoint a same-sex spouse as a unit's Key Spouse, notwithstanding

the spouse is the consensus best choice for the role or the only spouse willing to serve.

- The commander of a major command rejects someone as a wing commander because, for religious reasons, he objects to a same-sex spouse having the important representational role traditionally taken by a wing commander's spouse.

- An Airman assigned to the Military Personnel Flight refuses, on religious grounds, to enter a same-sex spouse into the Defense Enrollment Eligibility Reporting Systems—DEERS—database because that would constitute an endorsement of same-sex marriage.

- And perhaps the worst case scenario: for religious reasons, a commander refuses to participate in a casualty notification for an Airman killed in action because the Airman's spouse is the same sex as her dead wife.

The potential consequences of the Bohannon decision aren't limited to issues of same-sex marriage. Consider these:

- A Roman Catholic commander refuses to sign the spouse appreciation certificate for the second spouse of a Roman Catholic retiree because the retiree is divorced from her first spouse and signing the certificate would be an endorsement of the remarriage, contrary to Church doctrine.

- A commander refuses to appoint someone as a Key Spouse because the marriage was a civil one and not presided over by a clergy person, and the commander's faith only recognizes marriages performed in religious ceremonies.

Before you dismiss these potential consequences as Chicken Little rhetoric, remember how emotionally charged this issue can become. In today's climate, there is a readily-available, active advocacy for Air Force leaders to make decisions contrary to custom or policy as a way to promote religious beliefs and establish dominion over secular institutions. These advocates are no doubt emboldened by the Supreme Court's *Masterpiece Cake* decision despite the razor-narrow grounds supporting it.[33] On the other hand, others are willing to focus intense scrutiny on Colonel Bohannon and other Air Force leaders that have vocally supported him. If a commander is known to oppose same-sex marriage on religious grounds, it is possible that members of the command could tee him up at every opportunity to choose between supporting his troops and his religious sensibilities. For example, recall the case of Kentucky clerk of court Kim Davis who, in the wake of *Obergefell*, refused on religious grounds to issue marriage licenses to same-sex couples. For a while, it seemed like every gay couple in Kentucky was lined up in her office (with TV camera crew in tow), demanding a marriage license even though there were many other Kentucky clerks of court available and willing to issue the licenses.

> The outcome should not be a statement that he had a right to do what he did when every relevant legal authority says otherwise.

With the Bohannon decision, the Air Force walked into this culture war crossfire. Instead of applying "current law and policy," the Bohannon decision did the exact opposite and ignored Colonel Bob Bosler's—my Professor of Aerospace Studies at Washburn University in 1973—first rule of problem solving: if you have a can of worms, whatever you do, don't turn it into a barrel of snakes. Instead of solving one problem, the Bohannon decision created precedent for many more that may not, indeed cannot, be resolved the same way without sanctioning open season for discrimination against same-sex marriage, something forbidden by the Air Force's own instruction and contrary to the Supreme Court's declaration that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[34]

THE SOLUTION

It is possible that the Secretary of the Air Force or the Secretary of Defense could change the decision.[35] If the "Do Not Promote" PRF against Colonel Bohannon was too harsh, fine—a competent authority could perhaps substitute something more lenient, but the outcome should not be a statement that he had a right to do what he did when every relevant legal authority says otherwise. Even if the Air Force doesn't change the Bohannon decision, our leaders should make clear that it's not precedent. If a similar case comes up, it must be decided differently. It's not arbitrary or capricious if you change your mind because you've realized a prior decision was a mistake.[36] However we get there, the Air Force ought to make clear Colonel Bohannon's action is not a signpost for future decisions. This case led us down the wrong road. We need to back up and take the right one. The Air Force culture war capability needs to match its kinetic capability and that starts with correctly applying the law. And maybe it ends there, too.

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ENDNOTES

[1] U.S. Dep't of the Air Force, Instr. AFI 36-2603, Air Force Board for Correction of Military Records (AFBCMR), (18 Sep. 2017) [hereinafter AFI 36-2603].

[2] 10 U.S.C. §1552; AFI 36-2603, para. 1.2.

[3] 10 U.S.C. §8013(b) (Secretary has "authority necessary to conduct, all affairs of the Department of the Air Force…"); Bonewell v. United States, 2012 U.S. Claims LEXIS 8 (Fed. Cl. 2012) ("[T]he only official with the authority to overrule the AFBCMR's recommendation and deny plaintiff's application is…the Secretary").

[4] The Secretary of Defense also has plenary authority to overturn the Bohannon decision but, as of this writing, has not done so. *See* Schwalier v. Hagel, 776 F.3d 832, *cert. den.* 2015 LEXIS 4104 (2015) (Secretary of Defense determined Secretary of the Air Force did not have legal authority to "correct" individual's records to reflect promotion).

[5] Kyle Rempfer, *Air Force Colonel's Career Restored after Same-Sex Marriage Discrimination Incident,* A.F. Times (3 Apr. 2018), **https://www.airforcetimes.com/news/your-air-force/2018/04/03/air-force-colonels-career-restored-after-same-sex-marriage-discrimination-incident/**.

[6] *Id.*

[7] 42 U.S.C. section 2000e *et seq*.

[8] *See, e.g.,* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2nd Cir., 2018) (sexual orientation discrimination is sex discrimination under Title VII when based on **employer's gender stereotypes**); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir., 2017), *cert. den.,* 2017 LEXIS 7377 (employer's **perceived gender nonconformity** of employee may be basis for sex discrimination claim); Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339 (7th Cir., 2017) (*en banc*) (holding discrimination on the basis of **sexual orientation** is itself a form of discrimination based on "sex" under Title VII). *See also* Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (**harassment** based on sexual orientation violates Title VII under "hostile environment" theory).

[9] AFI 36-2706, *Equal Opportunity Program Military and Civilian,* 5 Oct 10, Incorporating Change 1, 5 Oct 11.

[10] Some of the people I've spoken with concerning this case attach significance to the view that a certificate of appreciation for a retiree's spouse is not a required action. AFI 36-3203, *Service Retirements*, para. 6.3 (18 Sep 2015), incorporating Change 1 (30 Aug 2017) ("If appropriate, the spouse of [a qualifying retiree] ***may*** be issued the certificate" (emphasis added)). The AFI goes on to specify three situations when the spouse certificate will not be issued; none of these exceptions references religious objection. As a former administrative law judge, I can tell you that when a statute or regulation says an agency "may" take an action, and then specifies the situations where the action isn't appropriate, the accepted interpretation is the agency ***must*** take the action unless one of those specified exceptions applies; otherwise, it's an invitation for the agency to act arbitrarily. See, e.g., *Gold Diggers, LLC v. Town of Berlin*, 469 F. Supp. 2d 43, 63 (D. D.C. 2007) ("may" means "must" when context permits and such interpretation is necessary to effect legislative intent). My interpretation of AFI 36-2203 is the certificate was required for this retiree's spouse. Regardless, there's no authority for the remarkable proposition that commanders may discriminate contrary to Air Force instruction as long as it's a discretionary act.

[11] AFI 36-2706, para. 1.1.1.

[12] *Obergefell v. Hodges,* 135 U.S. 2584 (2015), 2015 LEXIS 4250 (2015) (striking down state laws defining "marriage" as between a man and a woman as denying same-sex couples the fundamental right to marry, in violation of the Equal Protection Clause of the 14th Amendment).

[13] 494 U.S. 872 (1990).

[14] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…").

[15] 494 U.S. at 880-1.

[16] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm.,* 138 U.S. 1719 (2018), 2018 U.S. LEXIS 3386 (2018). In ruling in favor of a bakery owner who declined to provide a wedding cake for a gay couple, asserting his religious opposition to gay marriage, the Court had an opportunity to revisit *Employment Division v. Smith* but declined. Instead, the Court focused on the Colorado Civil Rights Commission's handling of the administrative complaint against the baker, finding the Commission's decision inconsistent with the State's obligation of neutrality when it came to religion. Slip op. at 9, 30. Specifically, the Court found that the Commission acted with "impermissible hostility" toward the owner's religion thereby denying him the "neutral and respectful consideration" of his beliefs to which he was entitled. Slip op. at 23. *See also Arlene's Flowers, Inc. v. Washington,* 138 U.S. 2671 (2018), 2018 LEXIS 3950 (2018) (case involving florist's refusal to supply flowers for a gay wedding remanded to Supreme Court of Washington for further consideration in light of *Masterpiece Cakeshop*). If *Masterpiece Cakeshop* had been decided earlier, it wouldn't have been much help in resolving the Bohannon controversy. That's because as it was a state-action case decided under the First and Fourteenth Amendments and not the Religious Freedom Restoration Act, which governs the federal government's decisions in this area (*see* fn. 14 and associated text). *Masterpiece Cakeshop* also had significant issues of artistic expression under the First Amendment's Free Speech Clause in play, as well as other decisions by the Colorado Civil Rights Commission that the Court saw as evidence of hostility toward the shop owner's religious beliefs. That said, there are lessons from *Masterpiece Cakeshop*

that are worthy of discussion in the context of the Air Force's culture war over same-sex marriage. I'll note a few near the end of this piece. The rest will have to wait for a future article.

[17] *See,* respectively, Art. 92(3), Art. 133, UCMJ; 10 U.S.C. §§982(3), 933.

[18] 42 U.S.C. § 2000bb *et seq.*

[19] 42 U.S.C. §2000bb-1 (emphasis added). Although RFRA, by its terms, applies to "government" whether federal, state, or local, the Supreme Court has held RFRA's application to state and local governments is unconstitutional. *City of Boerne v. Flores,* 521 U.S. 507 (1997).

[20] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), 2014 LEXIS 4505 (2014).

[21] 42 U.S.C. §300gg-13(a)(4).

[22] *Hobby Lobby,* 2014 LEXIS at 70 (emphasis added).

[23] For example, the facts of *Employment Division v. Smith*, which prompted RFRA: Smith **herself** used peyote in violation of state law and her employment contract. *See also United States v. Vasquez-Ramos* 531 F.3d 997 (9th Cir. 2008), *cert. denied*, 555 U.S. 1154 (2009) (U.S. had compelling interest to regulate possession of eagle parts and feathers **by defendant** notwithstanding removal of bald eagle from endangered species list); *Watson v. Boyajian*, 403 F.3d 1 (1st Cir., 2005) (bankruptcy debtors argued RFRA required trustee to approve payments of parochial school tuition from **debtors'** disposable income); *Klingenschmitt v. United States*, 119 Fed. Cl. 163 (2014), *aff'd* 2015 LEXIS 22032 (Fed. Cir. 2015), *cert. denied,* 137 U.S. 93 (2016), 2016 LEXIS 5084 (2016) (former Navy chaplain argued poor fitness report violated RFRA because it was based on **chaplain's statements** during services), and many more.

[24] 75 M.J. 407 (CAAF, 2016).

[25] 75 M.J. at 415.

[26] *Id.* at 417 (emphasis original; citations omitted).

[27] *Id.* at 418.

[28] Space limitations and a desire to focus on the "substantial burden" issue deter me from addressing the legal significance of Colonel Bohannon's attempt to request an accommodation. Suffice to say his failure to timely use the process set out on DoDI 1300.17 and his express determination to disregard any decision that went against him do not help his arguments.

[29] Apologies to Jane Austin.

[30] Rempfer, *supra* note 5.

[31] *Hensley v. United States,* 2018 U.S. Dist. LEXIS 29024 (2018) ("decisions by boards for correction of military records are typically reviewed under 'an unusually deferential' application of the arbitrary or capricious standard," *quoting Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989).

[32] *Masterpiece Cakeshop*, *supra* note 16, slip op. at 9.

[33] *Supra* note 16.

[34] *Id.,* slip op. at 18.

[35] *Supra* note 4.

[36] *See, e.g., American Training Services, Inc., v. Veterans Admin.,* 434 F.Supp. 988 (D. N.J. 1977) (Veterans Administration may change its interpretation of a statute).

Crazy Horse and Custer

Lessons in Freedom through Discipline from Two American Warriors

BOOK: *CRAZY HORSE AND CUSTER: THE PARALLEL LIVES OF TWO AMERICAN WARRIORS* BY STEPHEN E. AMBROSE

BY MAJOR CHRISTOPHER T. STEIN

The central storyline details the lives of two men, "war lovers," "men of aggression… men of supreme courage," who "died as they lived—violently."

The Sioux could not simultaneously be free and be effective soldiers. They chose to remain free.[1]

On June 25, 1876, the parallel lives of two great—and fatally flawed—American warriors intersected near the Little Bighorn River in Montana. While we often remember this Battle of Little Bighorn, or Custer's Last Stand, as a dramatic high point in the United States' war on the American Indians, realistically it was but a last gasp of air by the dying American Indians who already had been thoroughly defeated and demoralized throughout the lands they once called home. Best-selling author Stephen E. Ambrose uses this battle, and the route its opposing iconoclast leaders took to get there, to show us that the United States' victory over the American Indians was earned not by tactical brilliance or moral righteousness, but rather through discipline. In this way, *Crazy Horse and Custer* is an *apologia* for the military justice system and the Judge Advocate General's Corps.

Though weighing in at a heavy 527 pages in paperback, *Crazy Horse and Custer* is a breezy and engaging popular history that is easy to enjoy. In addition to best-sellers familiar to military officers, such as *Citizen Soldiers*, *The Wild Blue*, and *Band of Brothers*, *Crazy Horse and Custer* provides ample evidence that Ambrose's "great gift was that he refused to allow people to think history was boring."[2] Rather than getting bogged down in inconsequential details and debates about the minutia of specific battles, Ambrose paints in broad brush strokes, giving the reader a riveting view of the landscape, the people, and the ideals at play in this Nineteenth Century American theater.

The central storyline details the lives of two men, "war lovers," "men of aggression…[m]en of supreme courage," who "died as they lived—violently."[3] Crazy Horse and Custer were "outstanding warrior[s] in war-mad societies."[4] The story is as much about those societies as about the men. Freedom, in the form of Crazy Horse's Sioux, who maintained an independence like "the air they breathed or the wind that blew."[5] Discipline, in the form of Custer's U.S. Army and American society generally, where "every man had someone telling him what to do."[6] Persuasively presented with themes that will resonate with military officers, readers must still keep in mind that "history is written by the victors."[7] While the work is a valuable contribution to popular history, some readers rightly will be concerned by parts that seem to excuse despicable actions and by recent revelations that cast aspersions on Ambrose's credibility as a historian.

FREEDOM – THE AMERICAN INDIANS

As the U.S. soldiers dragged him into the three-foot-by-six-foot cage that was to be his new home, Crazy Horse lashed out against his captors, refusing to give up the unchained freedom for which he had long lived.[8] The soldiers—to shouts of "Stab the son-of-a-bitch!" and "Kill him!"—quickly cut him down, delivering the final symbolic blow to any remaining vestiges of American Indian freedom and power.[9]

While pitiful when it happens, by this point in the story the reader knows it is inevitable that Crazy Horse the man will die, as had already the ideals for which he fought. The Crazy Horse people "embraced an idea. Their loyalty was not to family or band or tribe, but to freedom."[10] The Sioux grew up with "practically no restraint."[11] Young children nursed on the breast of whichever woman happened to be near, no one stopped them from learning through experience that fire is hot, and they toilet trained only by watching older children.[12] In other words, the Sioux lived "without compulsion."[13] Crazy Horse did as he wished—he lived with whichever tribe he wanted, ate when it pleased him, slept when he was tired, and "neither took nor gave orders."[14] When the ground got too dirty or the hunting too sparse, the tribe packed up and moved on.[15]

According to Ambrose, it was exactly this coercive law—or discipline—that the American Indians lacked and the American soldiers had that made all the difference.

In the midst of the relentless United States expansion westward in pursuit of "the doctrine of material progress,"[16] this "way…could no longer be tolerated."[17] By the time of Crazy Horse's death, the American Indians "were no longer free."[18] The United States, through its Army and its traders, had imposed its values, insisted upon adoption of its economic system, and deprived the natives of their freedom of movement. By Ambrose's telling, this was not inevitable; but because the American Indians were unwilling to sacrifice their freedom—to impose individual limitations for the sake of group survival—they lost it.

In illustrating this lesson, *Crazy Horse and Custer* fits well within the broader Great Conversation.[19] Even two thousand years ago, Cicero described how "unlimited license comes to a head" and "freedom itself plunges an over-free populace into slavery."[20] During the Enlightenment, Immanuel Kant lamented the "attachment of savages to lawless liberty" and their "preference of wild freedom" that leads to "incessant conflict with each other."[21] Neither comment would feel out of place in *Crazy Horse and Custer*. As a solution, Cicero proposed that "law is the bond which holds together a community of citizens."[22] Kant too agreed the antidote to "savage, lawless freedom" was submission to "public coercive law."[23] According to Ambrose, it was exactly this coercive law—or discipline—that the American Indians lacked and the American soldiers had that made all the difference.

DISCIPLINE – THE U.S. ARMY

George Washington famously wrote: "Discipline is the soul of an army."[24] Phrased slightly differently by Ambrose: "Discipline is what makes an army—and civilization."[25] In this war between two great American societies, "[t]he crucial difference was discipline."[26] Custer, despite his two court-

martial convictions,[27] "was disciplined…Crazy Horse was not."[28] Custer's America, because it was constrained, was "infinitely more productive than Crazy Horse's." [29] Crazy Horse's Sioux were a "woefully inefficient people," who, because they could do whatever they wanted, were "in the end unable to defend their way of life."[30] Custer's people, because of the discipline imparted by cultural norms and the rule of law, "could act in concert for a common objective, while Crazy Horse's could not."[31]

Multiple times the American Indians had the United States at a strategic disadvantage and yet their unrestrained individuality and personal freedom prevented them from capitalizing on it. When they fought "[n]o one directed the Indian assault—it was every man for himself."[32] Where the U.S. Army went into battle in uniform, with individual interests subordinated to the group, the Sioux "went into battle in the most extreme, individualistic manner possible," painting their bodies and their horses distinctly to stand out as individuals.[33] Where the United States was full of bosses, American Indian society "was, essentially, bossless—no man could tell another what to do."[34]

Custer had the power of the court-martial—coercive law that could overcome each individual's preference for "wild freedom" and force soldiers to work toward national goals.

Given this absence of discipline, "[t]he Sioux failure to follow up their [military] advantage… was inevitable."[35] They "would never have submitted to the discipline that alone could have made the follow-up campaign work."[36] They would have had to empower leaders to "give orders and see to it that they were enforced," and attack in concert with the object of destroying the enemy, rather than winning personal honors within the tribe. [37] In short, they would have needed to change their mindset so significantly that it "would have meant an end to the Sioux way of life just as surely as defeat at the hands of the whites."[38]

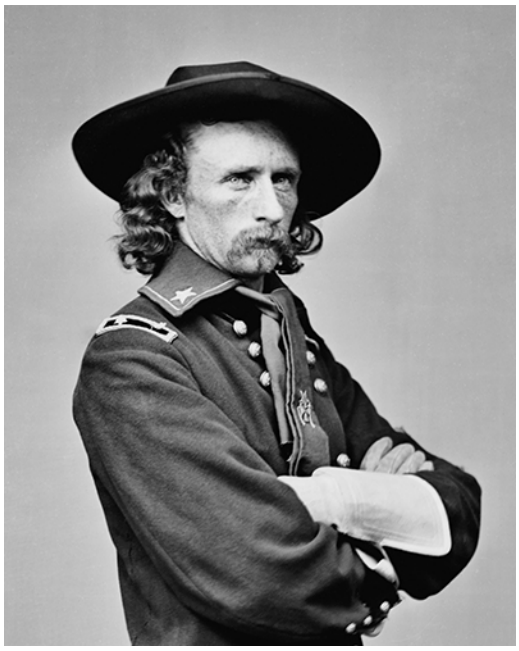
The U.S. Army succeeded because they were more disciplined. Despite horrible conditions, meager provisions, and bad leadership, "Custer got his men to charge because he could threaten them with something worse than the risks of the battlefield if they did not."[39] Custer had the power of the court-martial—coercive law that could overcome each individual's preference for "wild freedom" and force soldiers to work toward national goals. He also had the power of cultural norms, common education, and shared experiences that allowed members of the society to "acquire the kind of character which makes them *want* to act in the way they *have* to act."[40] In this way, the powerful *outer force* of court-martial was complemented by "*inner compulsion* and by the particular kind of human energy which is channeled into character traits."[41]

Ambrose shows us that while the United States often bungled military tactics and lacked the moral imperative, relentless persistence by the more ordered and disciplined force overwhelmed the disorganized and fatally individualistic American Indians.

In his explanation of the tragic decimation of the free American Indians and victorious triumph of the disciplined United States, Ambrose imparts a dramatic lesson for military officers and judge advocates. Even Custer's death at Little Bighorn shows that when leaders are self-seeking and their forces disorganized, they lose. Nations at war succeed when disciplined character is channeled within a well-ordered fighting force held together by strong compulsive laws that can overcome the most trying of circumstances.

HISTORY – A COMPLICATED LEGACY

History, Ambrose tells us, "is not black or white nor is it propaganda. History is ambiguous, if told honestly."[42] While doubtlessly true, that ambiguity is where the perspective of the historian shines through. Ambrose counted himself early in his career among the "new left professors who often taught what was wrong with America."[43] *Crazy Horse and Custer*, however, first published in 1975, often reads more in line with his later goal of "want[ing] to tell all the things that are right about America."[44] While much of his story feels balanced and he rightly points out the provocation[45] and pretext[46] of the United States' actions toward the American Indians, many readers will be appalled by his moral equivocation at times.[47]



General George Custer, U.S.A. Civil war photographs, 1861-1865, Library of Congress, Prints and Photographs Division.

Custer himself, whose treatment in American history has fluctuated between sinner and saint, is largely lionized in this account. A self-described "hero worshipper," Ambrose acknowledges that "Custer rode to the top… over the backs of his fallen soldiers," and earned his reputation at the price of the "lives of hundreds of men who fell following his flag,"[48] but seems quick to excuse his intolerable selfishness and immutable prejudices as mere quirks and eccentricities of a man in pursuit of greatness.[49]

Finally, despite his worthy contribution to making history accessible to a popular audience, it is important to note that Ambrose came under fire late in his career for alleged plagiarism—presenting other authors' words as his own without using quotation marks.[50] More seriously, he was accused of grossly exaggerating his relationship with President Dwight Eisenhower and, perhaps, making up interview material he included in his two-volume biography of the president.[51] Rather than the "hundreds and hundreds" of hours he claimed to have spent with Eisenhower, he probably only spent five.[52] While this does not impugn the narrative power of *Crazy Horse and Custer* nor undermine the dramatic lessons available to military officers, it does show that—like his historical subjects—Ambrose was a complex human being and his legacy is complicated.

CONCLUSION

Crazy Horse and Custer is a gripping look at two American legends and the distinct American societies that went to war over the West in the latter half of the Nineteenth Century. Ambrose shows us that while the United States often bungled military tactics and lacked the moral imperative, relentless persistence by the more ordered and disciplined force overwhelmed the disorganized and fatally individualistic American Indians. In trying to preserve their "wild freedom," they lost it. This lesson on the need to temper freedom with discipline is worthwhile for every military officer and judge advocate to contemplate.

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **Smithsonian Channel:** Where Sitting Bull and Crazy Horse Defeated Colonel Custer (Video 3:58)
- **Khan Academy:** Custer's Last Stand — from the Lakota Perspective (Video 6:06)
- **Britannica.com:** George Armstrong Custer
- **History.com:** 10 Surprising Facts About General Custer
- **History.com:** Crazy Horse
- **History.com:** Indians defeat Custer at Little Big Horn
- **Crazy Horse Memorial**
- **National Park Service:** Little Bighorn National Park

ENDNOTES

[1] Stephen E. Ambrose, Crazy Horse and Custer: The Parallel Lives of Two American Warriors 66 (Anchor Books 1996) (1975).

[2] Associated Press, Stephen E. Ambrose, Prolific Author and Historian, Dies at 66, N.Y. Times, Oct. 13, 2002 (quoting Douglas Brinkly), **http://www.nytimes.com/2002/10/13/obituaries/stephen-e-ambrose-prolific-author-and-historian-dies-at-66.html**.

[3] Ambrose, *supra* note 1, at xiii.

[4] *Id.* at 219.

[5] *Id.* at 9.

[6] *Id.* at 122.

[7] This common saying is attributed in different forms to many different authors, most memorably Winston Churchill.

[8] Ambrose, *supra* note 1, at 472.

[9] *Id.* at 473.

[10] *Id.* at 390.

[11] *Id.* at 39.

[12] *Id.* at 39-40.

[13] Ambrose, *supra* note 1, at 49.

[14] *Id.* at 122.

[15] *Id.* at 15-16.

[16] *Id.* at 322.

[17] *Id.* at 474.

[18] *Id.* at 474.

[19] *See generally* Robert M. Hutchins, Introduction to 1 Great Books of the Western World (Robert M. Hutchins & Mortimer J. Adler, eds., 1952).

[20] Marcus Tullius Cicero, On The Republic (c. 51 B.C.E.), *reprinted in* The Republic and The Laws 31 (Jonathan Powell ed., Niall Rudd trans., Oxford Univ. Press 1998).

[21] Immanuel Kant, Eternal Peace: A Philosophical Essay (1795), *reprinted in* Eternal Peace and Other International Essays 81 (W. Hastie, trans. 1914).

[22] Cicero, *supra* note 22, at 22.

[23] Kant, *supra* note 23, at 86.

[24] George Washington's General Instructions to All the Captains of Companies (Jul. 29, 1757), in 1 The Writings of George Washington, 1748-1757, 470 (Worthington Chauncey Ford ed., G.P. Putnam's Sons 1889).

[25] Ambrose, *supra* note 1, at 198.

[26] *Id.* at 206.

[27] *Id.* at 116-17, 300.

[28] *Id.* at 122.

[29] *Id.* at 122.

[30] *Id.* at 50.

[31] Ambrose, *supra* note 1, at 122.

[32] *Id.* at 240.

[33] *Id.* at 220.

[34] *Id.* at 122.

[35] *Id.* at 66.

[36] *Id.* at 67.

[37] Ambrose, *supra* note 1, at 66.

[38] *Id.*

[39] *Id.* at 206.

[40] *Id.* at 89, *quoting* Erich Fromm, Individual and Social Origins of Neurosis, in Personality in Nature, Society, and Culture 409 (Clyde Kluckhohn & Henry A. Murray eds., 1949), *as cited in* David M. Potter, People of Plenty: Economic Abundance and the American Character 11 (1954).

[41] *Id.*

[42] *Id.* at 324.

[43] Associated Press, *supra* note 4.

[44] *Id.*

[45] Ambrose, *supra* note 1, at 322 ("[Y]ou push them, you shove them, you ruin their hunting grounds, you demand more of their territory, until finally they strike back…so that you can say 'they started it.'").

[46] *Id.* at 396 (explaining that after deciding to make war, the United States "then began to look for a *casus belli*. It found its excuse…").

[47] *Id.* at 323 (asking "who is to say they were wrong?" about the United States steamrolling the American Indians on the "path of progress" and describing a "well-meant program" that was far from genocide).

[48] *Id.* at 195.

[49] *Id.* at 444.

[50] Michael Nelson, *The Good, the Bad, and the Phony: Six Famous Historians and Their Critics*, 78 Va. Q. Rev. (2002), **http://www.vqronline.org/essay/good-bad-and-phony-six-famous-historians-and-their-critics**.

[51] Russel Goldman, *Did Historian Stephen Ambrose Lie About Interviews with Dwight D. Eisenhower?*, ABC News (Apr. 27, 2010), **http://abcnews.go.com/US/historian-stephen-ambrose-lie-interviews-president-dwight-eisenhower/story?id=10489472**.

[52] Richard Rayner, *Channelling Ike*, New Yorker (Apr. 26, 2010), **https://www.newyorker.com/magazine/2010/04/26/channelling-ike**.

Book Review

THE LAW OF WAR: A DETAILED ASSESSMENT OF THE U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL

BOOK BY WILLIAM H. BOOTHBY AND WOLFF HEINTSCHEL VON HEINEGG
REVIEWED BY MR. BRIAN L. COX, CAPTAIN (RET), USA

The Department of Defense's (DoD) Law of War Manual (Manual) has been lauded as a comprehensive guide for practitioners and mocked as an inept effort to describe the law of war.

The Department of Defense's (DoD) *Law of War Manual* (*Manual*) has been lauded as a comprehensive guide for practitioners and mocked as an inept effort to describe the law of war. One notable commentary asks of the *Manual*, "**What is it good for?**,"[1] thus channeling the rhetorical question about war posed by Edwin Starr's 1970 classic soul smash hit. Starr's unequivocal conclusion is "Absolutely nothing." The commentary that invokes Starr reaches a similar conclusion regarding the *Manual*, and that observer is certainly not alone in this criticism.

Comprehensive compilation or good-for-nothing paperweight, the *Manual* is *the* authority related to the law of armed conflict presented by the DoD as a "resource for DoD personnel—including commanders, legal practitioners, and other military and civilian personnel."[2] Despite any perceived flaws and limitations, the *Manual* offers a consolidated collection of commentary on a vast array of topics involving the law of war. The tome attracts a great deal of criticism, but that is to be expected—it is, after all, a big target.

The criticism and commentary directed at the *Manual* can be a valuable resource for practitioners by highlighting limitations and provisions that may be contested outside (and sometimes inside) the DoD. This outside perspective is particularly useful in the coalition context, where competing legal interpretations and perspectives can impede effective interoperability. Though the outside commentary directed at the *Manual* can be a useful resource, on whole it is fragmented—scattered across various platforms, and sometimes emanates from sources whose credibility may be mediocre at best. These factors limit the effectiveness of the outside commentary for practitioners and other users of the *Manual*.

In light of this, *The Law of War: A Detailed Assessment of the U.S. Department of Defense Law of War Manual* (*Detailed Assessment*) provides a remedy to the limitations of existing outside commentary. The *Detailed Assessment* offers a consolidated, comprehensive, and thoroughly-researched assemblage of commentary on the *Manual* from two of the most knowledgeable and respected scholars in the field of the law of armed conflict. The authors have engaged in a meticulous review of the *Manual*, offering a paragraph-by-paragraph assessment of the content expressed in the *Manual*. Chapters 1 through 19 of the *Detailed Assessment* track the 19 chapters of the Manual as it was first published, and Chapter 20 of the *Detailed Assessment* considers the two revisions to the Manual published to date. The authors "plan to publish comment on any amendment" to the Manual "by electronic means" as additional revisions are issued.[3]

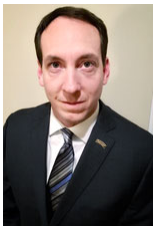
The consolidated and informed perspective provided by the *Detailed Assessment* is a valuable tool for practitioners and users of the *Manual*. The authors' intent is "to place before the reader their own appreciation based on their own collective experience."[4] Readers familiar with the authors' collective experience will appreciate the extensive nature of that expertise. The meticulous review on offer in the *Detailed Assessment* provides constructive commentary on each provision of the *Manual* while situating the perspectives in a broader practical and scholarly context.

While the value of the *Detailed Assessment* as a practice and research tool is commendable, its significance in a coalition context cannot be overstated. As the widespread criticism of the *Manual* indicates, there are many U.S. perspectives that are not shared, or are outright refuted, by current or potential future coalition partners. Anticipating, identifying, and coordinating such friction points can mitigate the impact of these unavoidable differences on effective interoperability. It is in this context that the value for practitioners of the *Detailed Assessment* is immeasurable.

Consider, for example, the assertion reflected in the *Manual* that the term "military objective" includes objects that make an "effective contribution to the war-fighting *or war-sustaining* capability of an opposing force."[5] The authors of the *Detailed Assessment* express their own concern that "broadening of the military objectives notion" to include objects that make an effective contribution to the *war-sustaining* capability of an opposing force "may place the intransgressible principle of distinction in some peril."[6] Nonetheless, the authors go on to surmise that a perspective such as the one expressed in the *Manual* "might imply that States party to [Additional Protocol I to the 1949 Geneva Conventions] are accepting a more restrictive interpretation of the military objective notion that would not, according to that view, be binding on all States"[7] as a matter of customary international law. The authors observe that if States attack war-sustaining objectives, although they are bound by the arguably more restrictive definition for military objectives reflected in Additional Protocol I, they "must have an explanation for their adoption of such a position" and that the approach expressed in the *Manual* may "help them to develop such a narrative."[8] This author has encountered this specific issue in in a coalition context, as have no doubt many other judge advocates. Anticipating and coordinating for such differences in military legal practice in a coalition context can go a long way to mitigate the effects of these inevitable variations on interoperability. The analysis provided by the *Detailed Assessment* is an indispensable tool to support that endeavor.

For any practitioner or scholar in search of the DoD perspective on a given topic involving the law of armed conflict, the *Manual* is the natural starting point. The practitioner or scholar in search of the perspective on the DoD view from outside the DoD may discover such an additional perspective through individual research, though the results of such a search may be of questionable value. Instead, the practitioner or scholar can turn to the consolidated, organized, and informed analysis provided by the *Detailed Assessment*. In this context, the *Detailed Assessment* is an indispensable companion to the *Manual* that will serve as a valuable resource for any practitioner or scholar working in the field of the law of armed conflict.

ABOUT THE REVIEWER



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ENDNOTES

[1] David Glazier, *The DOD Law of War Manual: What Is It Good For?*, Just Security (July 28, 2015), **https://www.justsecurity.org/24977/dod-law-war-manual-good-for/**.

[2] DoD Law of War Manual (June 2015 updated December 2016) [hereinafter Manual].

[3] William H. Boothby & Wolff Heintschel Von Heinegg, The Law of War: A Detailed Assessment of the Department of Defense Law of War Manual 4 (2018).

[4] *Id.*

[5] Manual, *supra* note 2, at para. 5.7.6.2. (emphasis added).

[6] Boothby & Von Heinegg, *supra* note 3, at 119.

[7] *Id.* at 122.

[8] *Id.*

Book Review

Civil Protections and Remedies for Servicemembers

BOOK BY KYNDRA MILLER ROTUNDA
REVIEWED BY COLONEL CORNELIA WEISS (RET)

"Civil Protections and Remedies for Servicemembers" is designed to provide the legal practitioner and individuals…understandable text and detailed section titles "in order to aid…in turning to just the right page when needed.

Service members returning from deployment often experience legal problems—such as not receiving disability entitlements, returning home to a default judgment entered while deployed, among numerous other issues. "Civil Protections and Remedies for Servicemembers" is designed to provide the legal practitioner and individuals proceeding pro se with understandable text and detailed section titles "in order to aid…in turning to just the right page when needed."[1] The author, **Kyndra Miller Rotunda**, is Professor of Military & International Law at Chapman University who previously served as an Army judge advocate. Written as both a call to serve veterans and a roadmap for getting started, this book addresses: the **Federal Torts Claims Act;** the **Servicemembers Civil Relief Act** (SCRA) (to include federal and state law provisions); service members' employment protections under the **U.S. Employment and Reemployment Rights Act** (USERRA); disability claims within the Medical and Physical Evaluation Board (PEB) Hearings; the Veterans Administration (to include disability compensation and pension claims); **Traumatic Service Group Life Insurance** (TSGLI) Appeals; and **Discharge Review Boards** and **Boards of Correction to Military Records**.

The book offers a primer for civilian attorneys ("Military 101") to include the basics of "military lingo."

The book offers a primer for civilian attorneys ("Military 101") to include the basics of "military lingo." The book lists law school clinics and pro bono organizations that can help when JAG offices are unable to provide support to service members and veterans. The book also contains forms, tables of laws, rules, secondary authorities, cases, pay and allowance charts, rank charts, and an index to augment the reader's search inquiries.

LEGAL OBSTACLES

"Civil Protections and Remedies for Servicemembers" addresses legal obstacles that military members face. The author addresses how the *Feres* doctrine[2] has been interpreted to bar service members from maintaining actions for racial discrimination,[3] Post Traumatic Stress Disorder (PTSD),[4] sexual assault and sexual harassment,[5] and asks whether such a "blackout curtain"[6] serves better than "sunshine as the best disinfectant."[7] One legal obstacle the author presents regards *Chappell v. Wallace*,[8] where the court found that "the Military's stated need for discipline and conformity reigned superior over a service member's Constitutional right to be free from illegal racial discrimination."[9] The author states how service members may also face significant challenges in child custody proceedings while deployed. For example, the author highlights that although the purpose of laws like SCRA is to "delay civil legal proceedings so that service members can focus on the mission at hand until after they have returned from military service,"[10] the "reality is that judges may not grant initial custody stays; may not continue to stay a child custody case for the entire duration of a deployment; and may even make permanent changes to child custody agreements entered prior to deployment."[11]

> Understanding the differences between disability claims within the military and disability claims before the VA is no light task.

ENTITLEMENTS

"Civil Protections and Remedies for Servicemembers" also addresses "entitlements" that service members may receive. Such entitlements may include claims for "disabilities that result from venereal disease contracted during a period of military service,"[12] blindness that occurs after leaving the service,[13] punitive discharge based on PTSD behavior,[14] and retaliatory discharge after being raped.[15]

Understanding the differences between disability claims within the military and disability claims before the VA is no light task. The author does not disappoint in this challenge. In the book, the author presents a clear and well thought-out framework that enables the reader to understand the main differences and nuances between the two systems. Ultimately, the author highlights the main distinction between disability claims within the two systems as, "The Military's Disability System is comparable to Worker's Compensation Systems; while the VA is more comparable to the Social Security Disability System. One is focused on work related injuries that lead to inability to continue working; the other is focused more generally on disabilities that occurred while working, whether or not they ended one's career."[16]

CONCLUSION

The book, as the author notes, "will not transform the reader into an over-night subject matter expert," but it does provide "solid tools and clear direction."[17] It is my hope that JAGs and paralegals alike will take up the author's invitation to contact her directly with comments, suggestions, or feedback for the betterment of future editions in the quest to serve and honor all military service members—past, present, and future.

ABOUT THE REVIEWER

Ms. Cornelia Weiss, Colonel (Ret), USAF

USAF (A.A., Colorado Mountain College; B.A., University of Utah; J.D.,Vanderbilt University School of Law; Master's in Defense and Security Studies of the Americas, Academia Nacional de Estudios Polĺticos y Estratégicos) writes on law and security issues.

ENDNOTES

[1] Kyndra Miller Rotunda, Civil Protections and Remedies for Servicemembers, 3 (Eagan, Minnesota: Thomson Reuters, 2017).
[2] Feres v. U.S., 340 U.S. 135 (1950).
[3] Rotunda, *supra* note 1, at 87.
[4] *Id*. at 88.
[5] *Id*. at 91-94.
[6] *Id*. Blackout curtains prevent light from entering or exiting.
[7] *Id*. at 94.
[8] *Id*. at 87. See also, Chappell v. Wallace, 462 U.S. 296 (1983)
[9] Rotunda, *supra* note 1, at 87.
[10] *Id*. at 130.
[11] *Id*. at 130-131.
[12] *Id*. at 3.
[13] *Id*. at 301.
[14] *Id*. at 3.
[15] *Id*. at 314.
[16] *Id*. at 215.
[17] *Id*. at 282.

Beyond Snowden

Understanding the Military Whistleblower Protection Act

BY LIEUTENANT COLONEL AARON JACKSON

Whistleblowers go far beyond Edward Snowden and touch nearly every organization in the armed forces.

In today's military environment, the word "whistleblower" is commonly used but rarely understood. Hearing it may invoke images of the twenty-something intelligence analyst who, in 2013, leaked highly classified information from the **National Security Agency**. This understanding of the "government whistleblower," however, only scratches the surface. Whistleblowers go far beyond **Edward Snowden** and touch nearly every organization in the armed forces. In 2018, the Air Force alone received 369 whistleblower cases—a sixty percent increase in annual cases since 2015.[1] The rising frequency, high-level visibility, and criminal implications of whistleblower cases demand the attention of every JAG office and demonstrate the need for judge advocates to maintain a firm grasp on this important area of law. As a result, this article provides a quick guide for attorneys facing military whistleblower cases – in the forms of restriction and reprisal – to better understand this complex, fascinating, and growing area of law.

WHAT CONSTITUTES "RESTRICTION"

The Military Whistleblower Protection Act (MWPA) provides the legal foundation for whistleblower cases in the Department of Defense (DoD) and protects against two things: reprisal and restriction.[2] Turning first to "restriction," the more basic of the two concepts, the MWPA states, "No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General."[3] From a high-altitude perspective, this provision ensures that members of the armed forces feel safe communicating with his or her congressperson or an Inspector General (IG), two entities with a specific interest in ensuring the health and stability of the armed forces. Individuals who act to prevent or deter communication with these entities endanger the greater organization by limiting one's ability to report and correct issues.[4]

There are several important things to remember regarding restriction cases.

There are several important things to remember regarding restriction cases. **First**, restriction within the MWPA only protects communications with an IG or Congress. Efforts to deter engagement with other persons or entities, while possibly an abuse of authority, does not amount to restriction under the MWPA.[5] **Second,** the MWPA only protects *lawful* communications with the Inspector General or Congress.[6] Unlawful communications, such as releasing classified materials to non-classified sources, is not protected by the MWPA.[7] **Third**, restriction includes attempts to restrict. That the military member ultimately communicated with an IG or member of Congress does not negate earlier efforts to restrict, and the offender may still be found in violation of the MWPA. **Fourth**, in addition to direct actions taken to restrict a member from communicating with an IG or Congress, restriction also includes any actions that produce an unnecessary "chilling effect."[8] While someone may not directly impede an individual from communicating with an IG or Congress, indirect actions that reasonably deter one's ability to freely engage with either entity may still amount to restriction.[9] **Fifth**, restriction is not a specific intent crime. Restriction includes negligent communications and/or behavior that would lead a reasonable person to believe they were being restricted.[10]

There is no bright-line test for analyzing restriction cases.

There is no bright-line test for analyzing restriction cases. Rather, **Air Force Instruction 90-301** provides the following two elements to consider: (1) How did the responsible management official (RMO)[11] limit or attempt to limit the member's access to an IG or a Member of Congress?; and (2) Would a reasonable person, under similar circumstances, believe he or she was actually restricted from making a lawful communication with an IG or a Member of Congress based on the RMO's actions?[12] Investigating Officers (IOs) and advising/reviewing attorneys must consider the totality of the circumstances to determine whether the preponderance of the evidence demonstrates that an individual was either directly or indirectly restricted from contacting the IG or Congress. If a reasonable person would have felt restricted under similar circumstances, the allegation should be substantiated.

While restriction considers efforts to restrict prior to a member's lawful communication with the IG or Congress, reprisal protects military members once a protected communication has been made.

"REPRISAL" & THE FOUR-PART ELEMENTS TEST

Reprisal is—by far—the most common whistleblower allegation.[13] The MWPA states, "No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing [a protected communication]."[14] While restriction considers efforts to restrict prior to a member's *lawful* communication with the IG or Congress, reprisal protects military members once a *protected* communication has been made. Reprisal generally exists any time a member of the armed forces faces negative repercussion for making a protected communication.[15] To assist IOs and judge advocates in analyzing reprisal allegations, the Air Force Complaints Resolution Program Supplemental Guide (AFCRPSG) provides the following four-part "elements test"[16]:

Element 1, Protected Communication (PC):

Did Complainant make or prepare to make a protected communication, or was Complainant perceived as having made or prepared to make a PC?[17]

There are several points to remember for this element. Unlike restriction, reprisal does not focus solely on communications with the IG or Congress. PCs within the MWPA's reprisal provision are much more extensive and include, among others, communications with DoD audit, inspection, investigation, or law enforcement organizations; court-martial proceedings; and/or statements provided to members of the chain of command.[18] While all lawful communications with the IG or Congress are considered PCs,[19] communications with other identified agencies/organizations must specifically identify violations of law or regulation; gross mismanagement, waste of funds, abuse of authority; or dangers to public health or safety, or threats to kill or cause serious bodily injury or damage to property.[20] Not all communications are considered PCs for reprisal purposes,[21] but the MWPA casts a fairly broad net.[22]

Element 2, Personnel Action (PA):

Was an unfavorable personnel action taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant?[23]

AFI 90-301 defines a PA as "[a]ny action taken on a member of the armed forces that affects or has the potential to affect that military member's current position or career…."[24] It is important to remember that PAs include unfavorable and favorable actions. Examples of unfavorable PAs may include administrative action (e.g. Letters of Reprimand[25]), nonjudicial punishment, and/or removal from a position.[26] Withholding favorable PAs, such as removing a member's award package from consideration or halting a favorable change in position, are also included in the MWPA.[27] Favorable PAs are particularly tricky, as an individual may claim some right to a favorable action in which he or she was never entitled and/or considered. As a result, judge advocates must carefully assess whether the evidence demonstrates that a favorable action was actually withheld as a result of an earlier PC. Also, do not forget that PAs also include threats to take a PA.[28] That the PA did not actually occur—or was at some point rescinded—is irrelevant so long as the threat was made.

Element 3, Knowledge:

Did the responsible management official(s) know that Complainant made or prepared to make protected communication(s) or perceive Complainant as having made or prepared to make protected communication(s)?[29]

The alleged RMO must know that the member made a PC prior to administering a PA. An individual cannot reprise against someone if they never knew the person made a PC. While an inappropriate PA without RMO knowledge may still amount to abuse of authority,[30] it is not reprisal. It is also important to remember that the military member does not have to actually make a PC to satisfy the knowledge element. Knowledge of an individual's preparation to make a PC, alone, is enough so long as the RMO knew of such preparation.[31] Further still, preparation is not actually necessary, as the RMO need only perceive that the individual made—or prepared to make—a PC. That such communication or preparation never actually took place is therefore immaterial in determining whether this element is satisfied.

Of the four reprisal elements, causation is the most complex and will likely require the most time and attention for the IO and advising attorney.

Element 4, Causation:

Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)?[32]

Of the four reprisal elements, causation is the most complex and will likely require the most time and attention for the IO and advising attorney. It is important to remember that

reprisal/restriction cases adopt the preponderance of the evidence standard, and it is here that IOs will most likely seek your advice. There are many different ways to explain this element to the (often perplexed) IO. The easiest approach is to merely ask the IO what he or she thinks more likely than not happened based on the evidence. If the IO believes that an RMO more likely than not took a PA based on a member's prior PC, the causal element has been satisfied. In most cases, there is some stated reason (other than reprisal) for taking a PA against the complaining member, as there are often other underlying issues that contribute to the decision. In many cases, the underlying factors demonstrate that the PA was appropriate, leading the IO to reasonably conclude that the PA would have taken place regardless of any PC. Such cases do not demonstrate reprisal based on the lack of causation (i.e. the PC did not cause the PA). If, however, the IO concludes that, despite the underlying factors, what most likely tipped the scales in deciding to administer a PA was the member's prior PC(s), the causation element has been met.

To reach a conclusion on the causation element, the IO must specifically address four factors within the Report of Investigation (ROI): Reasons, Timing, Motive, and Disparate Treatment.

To reach a conclusion on the causation element, the IO *must* specifically address four factors within the Report of Investigation (ROI): Reasons, Timing, Motive, and Disparate Treatment.[33] What were the *reasons* for the RMO taking a certain PA?[34] Was the *timing* between the member's PC and the PA close, or was there a gap in time that may remove any suspect nature of the action? Did the alleged RMO have any *motive* to reprise against the member?[35] Finally, were the RMO's actions in this situation consistent with his or her response to prior, similar situations, or was this member *disparately treated* in comparison to the past? The IO must specifically—and clearly—address each of these factors within the ROI. Ensure the IO fully explains all four factors using the preponderance of the evidence standard, citing specific evidence as justification for his or her findings. The clearer the analysis, the easier the report—and legal review—will be.[36]

There are generally two legal roles in whistleblower cases: the legal advisor (to the IO) and the legal reviewer (to the appointing authority).

A WORD ON PROCESSING THE CASE & JAG ROLES

In addition to understanding the law, it is important for judge advocates to understand the full process of whistleblower cases.[37] Once an individual makes a complaint alleging reprisal/restriction (and the IG determines that an investigation is warranted),[38] the appointing authority—typically the wing commander—appoints an IO to conduct an official investigation. A judge advocate should be assigned at this point to directly assist the IO.[39] After conducting a full investigation, the IO will produce an ROI that, once approved by the appointing authority, [40] is forwarded to the MAJCOM and SAF levels before final review and—hopefully—approval by the DoD.

Judge advocates play a vital role in this extensive process. There are generally two legal roles in whistleblower cases: the legal advisor (to the IO) and the legal reviewer (to the appointing authority).[41] Both are extremely important. Legal advisors remain in close communication with the IO throughout the process. Whistleblower cases are often complex in both investigation and law, and IOs are generally unfamiliar with either. As a result, judge advocates must work closely to ensure that all aspects of the investigation and resulting ROI are met. Legal advisors should work with the IO on the investigation plan, help prepare interview questions, sit in during difficult interviews, discuss the evidence in detail, explain the evidentiary standard, and ensure the IO provides a full and accurate final report. While the IO is responsible for making his or her own findings and conclusions, the lawyer should help the IO throughout the process. In short, advising on a whistleblower case is not a "one-and-

done" situation that allows for minimal legal oversight.[42] Given its high-visibility at the DoD level—and sometimes beyond—whistleblower cases require extensive legal support and review. Legal advisors must keep the communication flowing and ensure a strong relationship with the IO.

> Remember, legal reviewers are not writing the legal review for the local base; legal reviews are written for the Air Force and DoD.

The legal reviewer is equally important, as the legal review provides the capstone to an investigation and ROI that generally takes months—if not years—to complete. The legal review should provide a full description of the case and offer an independent legal analysis. Failure to do so may render the entire product insufficient, resulting in either more work for you or (even worse) additional—sometimes extensive—corrective effort at the higher levels of review. The DoD provides an extensive review of every case. The legal review, therefore, should reflect the seriousness of the allegations and review process, providing a full discussion and analysis of law and fact. Remember, legal reviewers are not writing the legal review for the local base; legal reviews are written for the Air Force and DoD.

CONCLUSION

Whistleblower cases provide a fascinating look into the inner workings of Air Force organization, leadership, and command. I highly encourage judge advocates to jump at any opportunity to take part in this important area of law. While this article cannot replace a full review of AFI 90-301 and the MWPA, it provides lawyers and judge advocates with a quick primer on how to review and process these interesting and complex cases. Whistleblower cases are generally few when stretched across the Air Force, but their numbers are on the rise, making it more likely that one may eventually reach your office. In the event a whistleblower case does come across your desk, you will hopefully be ready—and excited—to begin.

ABOUT THE AUTHOR

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **DoD IG Whistleblower Program**
- **No Fear Act**
- **TEDx**: How Whistleblowers Shape History (April 2017, 11:51)
- **TED Talks**: NSA Responds to Edward Snowden's TED Talk (March 2014, 33:19)

ENDNOTES

[1] This statistic comes from internal tracking within the Office of the Air Force Inspector General, Complaints Resolution Directorate.

[2] *See generally* 10 USC § 1034(a)-(b) (2017). U.S. Dep't of Air Force, Instr. 90-301, Inspector General Complaints Resolution (28 December 2018) [hereinafter AFI 90-301] provides the service-specific guidance for reprisal/restriction cases.

[3] 10 USC § 1034(a)(1).

[4] There is no statute of limitations on restriction allegations. Incidents occurring years prior may still require full investigation and analysis.

[5] One recent case centered on whether a squadron superintendent's "milling about" while Airmen completed an Equal Opportunity (EO) climate assessment amounted to restriction under 10 USC § 1034. The Air Force and DoD concluded that such actions did not equal restriction. While Airmen may have felt restricted from providing honest feedback on the EO climate assessment survey, a reasonable Airman would not conclude that they were deterred in any way from communicating with the Inspector General or Congress.

[6] *See generally* 10 USC § 1034(a)(1).

[7] *See* 10 USC § 1034(a)(2).

[8] AFI 90-301, *supra* note 1, at Attachment 1 defines chilling effect as "[T]hose actions, through words or behavior, that would tend to prevent an individual(s) from taking a proposed course of action."

[9] For example, during an all-call a squadron commander may haphazardly tell his Airmen that they must use the chain of command to address all problems and any efforts to go outside the chain of command will result in disciplinary action. While the squadron commander is likely not at all thinking of an Airman's right to contact the IG or Congress, his communication may lead a reasonable Airman to believe that they are inhibited from communicating with either entity. As a result, though unintentional, the squadron commander's actions may create a "chilling effect" that amounts to restriction.

[10] Negligent acts most often take place in the scenario provided directly above. While leaders can—and should—encourage using the chain of command, they must also never forget to include the caveat that the IG and Congress are always acceptable reporting options.

[11] For restriction purposes, an RMO is generally the individual named in the allegation that restricted, or attempted to restrict, a member from communicating with the IG or Congress. In reprisal cases, the RMO is the alleged individual that either took a personnel action (PA), influenced the decision to take a PA, or approved a PA against an individual that made, prepared to make, or was perceived as having made a protected communication. See AFI 90-301, *supra* note 1, at Attachment 1, for a full definition of RMO.

[12] AFI 90-301, *supra* note 1, at Table 6.1. The newest version of AFI 90-301, dated 28 December 2018, removed a third question regarding RMO intent, which separately required consideration of the reasons, reasonableness, and motive of the RMO's actions. This question was removed to avoid IO confusion and acknowledge that a "chilling effect" amounting to restriction may arise from unintentional, negligent words or behavior.

[13] In 2018, 81.6% of all Air Force whistleblower allegations were based on reprisal.

[14] 10 USC § 1034(b)(1).

[15] Unlike restriction, which has no statute of limitations, reprisal allegations are generally limited to one year from the time the member learns about a PA. *See* AFI 90-301, *supra* note 1, at para. 2.5.2.

[16] The new "elements test" adopts the DoD standard for analyzing reprisal cases.

[17] U.S. Dep't of Air Force, Air Force Complaints Resolution Program Supplemental Guide Attachment 16 (28 December 2018) [hereinafter AFCRPSG].

[18] *See* 10 USC § 1034(b)(1)(B).

[19] For example: walking into the IG office to ask the location of the nearest water fountain is considered a PC. *Any* communication with the IG or Congress, regardless of topic, is a PC.

[20] *See* 10 USC § 1034(c)(2).

[21] For example: a member's general complaints to his Airman roommate would likely not amount to a PC because the roommate is not in the member's direct chain of command. Additionally, such complaints must allege actual violations of law or regulation. While an Airman need not specifically cite the law or regulation violated in a given scenario, standard "gripes" are generally insufficient to establish a PC.

[22] PCs are not the same as privileged communications. Judge advocates must carefully review 10 USC 1034(b)(1)(A-C) and (c)(2) in determining whether a communication is a PC.

[23] AFCRPSG, *supra* note 16, at Attachment 16.

[24] *See* AFI 90-301, *supra* note 1, at Attachment 1, 142.

[25] Letters of Counseling are often *not* considered an unfavorable PA based on their minimal nature and rehabilitative purpose. Judge advocates must look to the totality of the circumstances for each potential PA and assess whether the action actually affects—or has the potential to affect—the member's position or career.

[26] Not all changes in position amount to an unfavorable PA (e.g. change in position/lateral move at the appropriate time in one's career, positions of enhanced leadership/responsibility, etc.). Again, judge advocates must consider the totality of the circumstances in determining whether an individual's removal from position has the potential the negatively affect his or her military career. *See* U.S. Dep't of Def., Inspector General Guide to Investigating Military Whistleblower Reprisal and Restriction Cases, at 1-4 (18 April 2017) [hereinafter DoD Guide].

[27] *See id.* at 1-5.

[28] *See* 10 USC § 1034(b)(2)(A)(i).

[29] AFCRPSG, *supra* note 16, at Attachment 16.

[30] *See* AFCRPSG, *supra* note 16, at Attachment 17.

[31] For example, an Airman may tell their supervisor, first sergeant, or commander they intend to contact the IG or Congress. Such communication would satisfy the knowledge element.

[32] AFCRPSG, *supra* note 16, at Attachment 16.

[33] *See id.*

[34] The IO must assess the evidence and determine the actual reason(s) for the RMO's actions.

[35] Being named within the PC often provides evidence of an RMO's motive to reprise. The opposite may also be true.

[36] IOs, like lawyers, should "make their money" in the analysis section.

[37] While this article provides a general foundation for approaching these cases, it is important to closely review AFI 90-301 and the MWPA for further details.

[38] The IG elects either to dismiss or investigate the allegation(s) through a 30-Day Determination document. In this document, the IG conducts an informal analysis to determine whether the complainant's allegation meets the prima facie for reprisal/restriction.

[39] If a specific judge advocate is not identified in the appointment memorandum, the legal office should directly appoint a lawyer to advise the IO throughout the investigation.

[40] At this point, the legal reviewer (discussed below) will conduct an extensive legal review in order to advise the appointing authority on whether to approve the ROI as legally sufficient or return the report for further action.

[41] The same judge advocate may assume both roles in certain circumstances. Legal offices, however, should provide separate attorneys, if at all possible, to avoid any actual or perceived conflicts of interest.

[42] Given the average IO's inexperience in the law, the legal advisor will almost assuredly find numerous errors within the ROI. As a result, legal advisors should review drafts of the ROI prior to document completion and work with the IO to ensure a strong final product. Waiting to review the ROI at the final hour risks a poor—or legally insufficient—product with no anticipated time to correct prior to the IO resuming regular duties.

Hurricane Michael

CONFRONTING A WORST CASE SCENARIO: TYNDALL AFB & HURRICANE MICHAEL

BY LIEUTENANT COLONEL DANIEL J. WATSON

A member of the weather flight mentioned they were **"keeping an eye on something"** in the Caribbean Sea, but there was definitely no sense of alarm in the briefer's demeanor.... We had no idea this would be our last day together as a group.

The first mention of a potential storm was a seemingly benign comment at our wing standup on 4 October 2018. A member of the weather flight mentioned something about "keeping an eye on something" in the Caribbean Sea, but there was definitely no sense of alarm in the briefer's demeanor. I admit that I did not think much about the comment at the time. The next day was a Friday, 5 October, and our office was preparing for a major push on our self-assessment program. We had lunch as an office in the courtroom and split off into sections in order to address assigned areas of the Article 6 checklist. Everyone was looking forward to the three-day Columbus Day weekend. We had no idea this would be our last day together as a group.

I had been in place at Tyndall Air Force Base for about two months and was excited to have the opportunity to lead a fighter wing legal office. With the arrival of two new JAGs fresh from the Judge Advocate Staff Officer Course (JASOC), all of our office teammates were in place and ready to take on the challenges that lay ahead. In fact, heading into the Columbus Day weekend, I remember talking with my leadership team, Deputy Staff Judge Advocate Major Satura Gabriel and Law Office Superintendent MSgt Tara Padua, and sharing the sense that good things were about to happen within the office.

Over the weekend, I started to receive additional email updates from the weather flight about an unnamed tropical storm.

TROPICAL STORM 14 – HURRICANE MICHAEL

Over the weekend, I started to receive additional email updates from the weather flight about an unnamed tropical storm. However, these alerts were not much different than the standard email notifications I received at other bases

regarding weather events. In casual conversations with neighbors, there was no sense of alarm or the impending danger. The first time I saw the name Michael assigned to the storm was the afternoon on Sunday, 7 October, in one of the weather flight emails. Until that point, it was referred to simply as Tropical Storm 14. The email reports became more frequent, but seemed to alternate between a tropical depression and a Category 1 hurricane. The last email on Sunday evening indicated the storm track had shifted slightly to the east, removing Tyndall from Michael's projected path.

The following morning, the news grew more ominous. Emails now reported the storm track had turned back toward Tyndall AFB. The school where my wife worked and my sons attended announced a school closure for the next few days. My wife informed me there was a noticeable sense of unease among her co-workers who were eager to evacuate the area.

EMERGENCY OPERATIONS ACTIVATED

Around 0815, the alarm bells started going off. The Emergency Operations Center (EOC) was recalled to report immediately. Captain Samantha Golseth responded on behalf of our office. Captain Corey Rotschafer would relieve her later that evening. Captain Golseth, who had graduated JASOC six months earlier, now found herself at the forefront of Tyndall's response to what would become one of the worst natural disasters to ever strike an Air Force base. I cannot imagine being thrust into a similar role at that stage of my career. Thankfully, Captain Golseth rose to the challenge.

Considering that an evacuation order has both legal and financial ramifications, I would recommend neither JA or CPTS attempt to write such an order in isolation.

EVACUATION ORDER

The Crisis Action Team (CAT) was subsequently notified to report at 1600. Major Gabriel and I received word that Colonel Brian Laidlaw, 325th Fighter Wing Commander (325 FW/CC), decided to order an evacuation of all aircraft and personnel in less than 24 hours. Working rapidly with Major Anthony George, the Comptroller Squadron Commander (325 CPTS/CC), we were able to have the order ready for signature prior to the scheduled CAT meeting. Considering that an evacuation order has both legal and financial ramifications, I would recommend neither JA or CPTS attempt to write such an order in isolation. In fact, many of the questions about the evacuation order that arose in the weeks and months after the evacuation were financial, as opposed to legal, ones.

At this point, Michael was still forecasted to reach landfall as a Category 1 hurricane, so we thought, at most, we might have a few broken windows and some potential water damage.

There was also a rush to protect the exterior offices in our building. At this point, Michael was still forecasted to reach landfall as a Category 1 hurricane, so we thought, at most, we might have a few broken windows and some potential water damage. We removed personal items such as diplomas and pictures from the office walls, turned off the power, covered our computers and office equipment with plastic bags, and Major Gabriel and I moved what we could into the centermost part of our office space away from the windows.

The CAT briefing was the first time the entire group learned of the potential magnitude of the storm. The wing commander told everyone that he had decided to order an evacuation of all personnel and aircraft. In a statement that later proved prophetic, he informed the CAT that based on weather reports he was receiving Tyndall might not be recognizable within the next 48 hours. Michael was still predicted to arrive as a Category 1 or Category 2 hurricane, but had the potential to intensify. All personnel who were not part of the ride-out team were ordered to depart the area no later than Tuesday, 9 October, at 1500. In addition

to the 325 FW command team (CC, CV, and CCC), a relatively small contingent of medical, security forces and civil engineers stayed on-base as part of the ride-out team. The commander wanted the CAT to meet once more on Tuesday morning, then get our families out of town.

> The Wing Commander informed the CAT that based on weather reports he was receiving Tyndall might not be recognizable within the next 48 hours.

All office personnel were notified of the evacuation order and plans to depart the area began in earnest. In talking to my neighbors, I was struck by the sense that no one thought this was going to be a big deal. Most people intended to ride out the hurricane at home. Thankfully, given the evacuation order, this was not an option for my family. We packed enough clothes for a few days. My wife and I expected it would be a bad storm, but believed we would be back in our house by the weekend.

PRE-HURRICANE CAT MEETING

On Tuesday morning, base leadership held a final pre-hurricane CAT meeting where we went over the "spaghetti models" indicating the path of the hurricane. Most of the 20 forecasts were predicting a relatively direct or close hit on the area in and around Tyndall. In the single humorous moment of a very serious morning, a lone green line model was predicting a zig-zagging storm that was veering west, then east for no apparent reason heading across Florida north of Tampa Bay for parts unknown. Someone in the CAT shouted out, "I'm rooting for the green one," which gave everyone a much-needed laugh. After receiving final updates, but before dismissing us, the wing commander told the group to go be leaders and take care of our people. He stated something to the effect that this moment was the reason we have exercised emergency scenarios our entire careers. After being dismissed. Major Gabriel and I did one last walk through of the office and prayed for the best before heading home.

My wife, two sons and two large Golden Retrievers packed up our van and departed from our home in Lynn Haven, Florida around 1030. We intended to head towards Birmingham or Huntsville, Alabama, which were both outside of any of the storm paths I had seen in the models. Though Montgomery was closer, some of the models showed that area to be in the potential storm path. Michael was now projected to make landfall as a Category 2 storm.

> As the day went on, the forecasts grew progressively worse. A Category 2 turned into a Category 3, then a 4.

Unfortunately, as the day went on, the forecasts grew progressively worse. A Category 2 turned into a Category 3, then a 4. The seriousness of the event had increased substantially. The worst-case scenario put forth by my commander the previous day was turning into the reality. Based on the updated forecasts, I diverted my family to Arnold AFB in Tennessee.

I texted Lieutenant Colonel Andy Barker, the Arnold AFB Staff Judge Advocate to let him know my intentions. In what would become a recurring theme, many of the friendships and professional relationships I had built through the years would suddenly play major roles in supporting me in the days ahead. Lt Col Barker was a JASOC classmate who had replaced me at Arnold. He and the entire Arnold team were exceptional hosts and ensured my family and I had all the support we needed.

AFTERMATH: RE-ESTABLISH OFFICE ACCOUNTABILITY

On 10 October, the day Michael made landfall, I set up in a spare office at Arnold AFB and went to work. The first thing I did was re-establish office accountability. Major Gabriel, MSgt Padua, and I had all been working the phones the previous day to ensure information was being disseminated to the entire office. Given the rapid nature of this event, all personnel had evacuated to various locations with limited time to coordinate. We also did our best to provide information to other JAG Corps personnel stationed at Tyndall, such

as the personnel assigned to the Utility Law Field Support Center, Air Force Civil Engineer Center, Area Defense Counsel, and Special Victim's Counsel.

In addition to establishing personnel accountability, I started upchanneling information to JAG leadership at our higher headquarters, Air Combat Command (ACC/JA) and Ninth Air Force (9 AF/JA). Both of those offices had evacuated the month prior in response to Hurricane Florence, but thankfully those locations were relatively unaffected by Florence. It was becoming clear that Tyndall and the local communities surrounding our base would not be as fortunate. The damage was going to be catastrophic, and all of our personnel now entered the phase of wondering what, if anything, would be left when we returned.

It was becoming clear…the damage was going to be catastrophic, and all of our personnel now entered the phase of wondering what, if anything, would be left when we returned.

STRONGEST HURRICANE TO EVER HIT THE FLORIDA PANHANDLE

Michael was initially identified as a high-end Category 4 hurricane with sustained wind speeds of 155 mph. Michael was later upgraded to a Category 5 by the National Hurricane Center with sustained wind speeds of 161 mph.[1] Michael would be categorized as the strongest hurricane to ever hit the Florida panhandle. With the upgrade to Category 5, it ranks as one of only four such storms to hit the United States.[2] Ultimately, a total of 59 people died as a result of Michael.[3] The path of destruction was approximately 35-40 miles wide along the Gulf Coast and cut a path into southern Alabama and Georgia. It was now clear that Colonel Laidlaw's decisiveness in ordering the evacuation had saved lives. To face such a consequential decision and get it right is a testament to his leadership. Outstanding leadership is a variable that Tyndall personnel were fortunate enough to have in place at a moment of crisis.

During the 10-12 October (Wednesday-Friday) timeframe, I continued providing information to my office personnel, ACC/JA and 9 AF/JA. The evacuation order was still in place, so no one could return to the area until recalled. Nevertheless, these three days were critical in terms of what would come next. I would later joke that I missed the Staff Judge Advocate Course (SJAC) elective on what to do when your base is destroyed, but in all seriousness, I immediately understood I would need the support of other JAG Corps members to address whatever challenges lay ahead.

In addition to the leadership at ACC/JA and 9 AF/JA, three individuals were critical: Colonel Shannon Sherwin (96 TW/JA, Eglin AFB), Lieutenant Colonel Tyson Kindness (1 SOW/JA, Hurlburt Field), and Mr. J.D. Reese (Air Force Claims Service Center). Unfortunately, I was never a claims officer at any point in my career, so Mr. Reese was about to become one of my new best friends. We were in frequent communication during this time period discussing the framework of what would become our emergency claims team.

I also coordinated with Col Sherwin and Lt Col Kindness, both of whom I had known prior to the hurricane. Given their proximity to Tyndall (and because of the type of people they are), both had reached out to me offering their support. In addition to Mr. Reese and I, personnel from Eglin and Hurlburt would later assist me in staffing a claims tent at Tyndall. The team I had begun to outline with Col Sherwin, Lt Col Kindness and Mr. Reese would be augmented with a team from 9 AF/JA.[4]

RETURN TO TYNDALL

On 13 October, I left Arnold AFB in Tennessee with the intent of relocating my wife and sons to stay with other family members in Pensacola, Florida. We were still uncertain about the status of our rental home near Tyndall, so it was unclear how long this arrangement would be necessary. All we could do was hope for the best.

Telephone and email communications with the Tyndall command team were down, but all the reports I received via social media and news outlets were worst case scenarios

coming true. I felt that I needed to move closer to Tyndall to be in the best position to help when needed. Based on discussions with Colonel Sherwin, I originally intended to establish a foothold within the Eglin AFB legal office.

The entire Panama City area was a cellphone dead zone. There was no electricity or running water. Curfews were imposed by local authorities as there were reports of looting.

Luckily, I was already driving south on Interstate 59 in Alabama when I received notice that Major Gabriel and I were among the first nine people being recalled to Tyndall. We were instructed to rendezvous with other recalled members at 0500 on Sunday, 14 October. The commander had given direct instructions that we travel in groups for safety. The entire Panama City area was a cellphone dead zone. There was no electricity or running water. Curfews were imposed by local authorities as there were reports of looting. No one could be sure about the status of social order in the affected areas.

Knowing that Major Gabriel and I would soon be unable to communicate with the rest of the office, I put Capt Rotschafer in charge of ensuring office accountability and providing information to our personnel. Continuity of operations is extremely important, so I provided him with the key points of contact and phone numbers. Capt Rotschafer's competence and ability to remain calm under pressure made him the perfect choice notwithstanding his soon-to-be status as the office's senior ranking available officer.

I met the Director of Staff, a squadron commander, and the two wing executive officers in Pensacola. Major Gabriel met her group in Defuniak Springs, Florida. We departed in convoys back towards Tyndall. Our respective groups were authorized to stop at our residences first in order to survey any damage and to grab uniforms, sleeping bags, and anything else we might need in an austere environment. We knew that the area and base had taken a tremendous beating, but pictures did not adequately capture what we were about to see.

MICHAEL'S AFTERMATH

Our cellphones no longer operated once we entered Bay County, Florida. Even before seeing visual signs of the storms, the roads were heavily congested with vehicles as contractors, relief workers, and emergency crews flooded into the area. About 20 miles north of Tyndall, the visual signs of destruction were apparent. The number of fallen trees snapped and damaged homes and businesses, grew beyond anything I had ever seen in person. As our convoy entered Lynn Haven, Florida (where most of our group lived), the town was almost unrecognizable. The scale of the devastation was beyond what I could have imagined.

One of the most memorable sights was what I saw passing by a church that had been destroyed by the storm. The roof had been ripped off and the walls had caved in. However, in the parking lot adjacent to the destroyed building, the church members had gathered to worship together in the hot Florida sun. In what appeared to me to be an act of defiance against the devastation, I was both emotionally impacted and inspired by the collective display of resolve. Our convoy then drove to our respective homes.

When I arrived at my house, my hopes for minimal damage were gone. Michael had ripped a good number of tiles from my roof. This allowed rain to get into the attic, soak the insulation and sheetrock, and cause the ceiling to collapse in my home below it. Large sections of wet, molding drywall now covered the floor and furniture in nearly every room.

I had evacuated with five days before. I did not realize it at the time, but the damage to my house would prevent my family from returning to the area.

I had about fifteen to twenty minutes to assess the situation before getting back on the road to Tyndall. Fortunately, I was able collect some extra uniforms, which only needed

to dry out a little, and a sleeping bag to augment the gear I had evacuated with five days before. I did not realize it at the time, but the damage to my house would prevent my family from returning to the area. Michael affected almost three-quarters of Bay County, Florida's 68,000 households. [5] It is estimated that 20,000 people were left homeless in Michael's aftermath.[6] In my home alone, all of the drywall and flooring had to be ripped out due to mold damage. My former landlord was not able to get the roof repaired until six months later. Efforts to repair the rest of the home are still ongoing. Now multiply my scenario by over 50,000 homes. This will provide some insight as to the magnitude of the housing problem.

The scenes of destruction on the roads to Tyndall were apocalyptic. It was reminiscent of something from a movie.

The scenes of destruction on the roads to Tyndall were apocalyptic. It was reminiscent of something from a movie. Power lines and trees were down everywhere. Houses and vehicles were wrecked at every turn. Scenes of people sifting through the ruins of their homes were similar to scenes from war documentaries I have seen on television. I had never seen damage anywhere close to what Michael inflicted upon the Panama City area.

Our two teams arrived at Tyndall sometime in the afternoon of 14 October. We then made our way to the AFNORTH Air Operations Center, which was only slightly damaged. The scene was similar to a deployed location. Generators hummed, and deployed security forces and communications personnel were busily engaged in their respective operations. Our arrival coincided with a visit from the Secretary of the Air Force, Chief of Staff, and Chief Master Sergeant of the Air Force. I met with General David Goldfein, who was interested in the details of my evacuation as well as the safety and security of my family. They surveyed the damage to the base and met with Tyndall personnel. After the departure of the official party, our commander convened the CAT. It was time to get to work.

Our initial briefing from the commander set out his initial assessment, expectations and priorities. There was an entire whiteboard full of objectives and goals, but at the top of his list was taking care of our people. We would work 24-hour operations until further notice. I would be on the day team with Colonel Laidlaw, while Major Gabriel would serve on the night shift with our Vice Commander, Colonel Jeff Hawkins. Even though the sun had set, Colonel Hawkins would later take me and two other recalled members on a night tour of the base. The extent of the damage would become more apparent over the next few days, but even in the darkness of that 14 October evening, Tyndall looked liked it had been subjected to a bombing campaign.

Our Command Chief Master Sergeant, Craig Williams, took us to the office building next to the AOC that served as our sleeping quarters for the next week or so. I shared a small office space with another lieutenant colonel, sleeping on cots on the opposite side of a desk. Major Gabriel had a similar arrangement with a female squadron commander. The water treatment facility that serviced the base had been damaged by the hurricane, which meant there was no running water. We were unable to take showers or shave without using bottled water. MREs became our primary food source.

The enormity of the task in front of the team was daunting. It was hard to know where to begin. On a personal level, my house was destroyed and my family displaced. My wife and sons established a safe haven location in Pensacola, three hours away. With the help of family and friends, my wife made several trips back and forth to salvage our household goods before mold consumed everything. The items she was able to save would remain in two separate storage sheds for the next few months until we moved to Ohio. The ultimate damage assessment concerning what we lost is still ongoing as my wife and I continue to realize missing items.

Unfortunately, I was not the only one from my office who suffered extensive property damage. Five people out of six-

teen came through the hurricane with only minor damage, which meant they would be able to move back into their homes. Everyone else's homes were devastated by Michael. One person from our office had the misfortune of unpacking his final household boxes the day the evacuation order was signed. Our legal team had been decimated. For a time, Tyndall's organic legal capability was down to Major Gabriel and me. We would need the assistance of other JAG Corps personnel in order to meet legal challenges. In our case, we received vital help from ACC/JA, 9 AF/JA, and other legal offices in our region.

The primary legal issues Tyndall faced were claims, legal assistance, ethics, property rights, and contracts.

Entire articles could be written related to the issues that arose in the weeks and months after Michael, but in the interest of brevity I will only highlight a few issues and general subject areas. The primary legal issues Tyndall faced were claims, legal assistance, ethics, property rights, and contracts.

ETHICS & LOGISTICS

ACC/JA and 9 AF/JA helped immensely with ethics. It is true that natural disasters bring out the best and worst in people. Focusing solely on the positive for a moment, people will want to help. We received numerous unsolicited gift offers from corporations, as well as private groups who simply wanted to contribute something. Knowing your authorities related to gifts to the Air Force is critical. Also knowing the units with whom donors need to coordinate, such as the Force Support Squadron and Logistics Readiness Squadron, should produce more efficient results. As it relates to donations of perishable food items (e.g. food trucks), remember to engage Public Health. While some of the logistics might not seem like legal ones, it is important to note that in an event such as I am describing, everything is a team effort.

Thankfully, people such as Ms. Elizabeth Waldrop (9 AF/JA) and Colonel Don Davis (ACC/JA), among others, stepped in to help take a number of these issues off our plate. Knowing that our capacity was limited and the installation commander would be extremely busy, higher level commanders and legal offices were able to analyze and approve these gift offers. In future situations, I would encourage MAJCOM and NAF legal offices to offer similar assistance to affected bases.

LEGAL ASSISTANCE, PROPERTY RIGHTS & CONTRACTS

Legal assistance is another major area where external JA teams provided major support. With the large number of Tyndall evacuees spread throughout the region, bases such as Eglin, Hurlburt, Keesler, Maxwell, and others saw an increase in Tyndall-related legal assistance. By far, the number one issue concerned landlord-tenant issues. Some tenants wanted to break their leases; for others, it was the landlord who intended to terminate the lease. It is not out of the realm of possibility that landlords will consider terminating leases in order to enter new, more lucrative leases in a suddenly tight housing market. In any event, there were plenty of issues to keep legal assistance attorneys busy in the weeks and months after the hurricane. I am personally grateful to all the legal offices who assisted Tyndall personnel during the evacuation.

While the range of destruction varied from house to house, almost every one of Tyndall's 867 housing units were rendered uninhabitable.

One of my primary lines of effort was the establishment of an on-the-ground claims team to provide information and support to Air Force personnel living in Tyndall privatized housing. My commander's stated intent was to provide Tyndall residents an opportunity to return to their homes in order to salvage as much of their personal property as possible. It was truly a race against time, because mold would soon consume personal property that might have been spared by the storm.

SAFE RETURN

While the range of destruction varied from house to house, almost every one of Tyndall's 867 housing units were rendered uninhabitable. The primary obstacle to allowing an immediate return was safety. The damage to both the base itself and the individual housing units did not allow for an immediate mass return. Between the debris on the roads (e.g., nails, wood, metal, etc.) and the unknown damage within the units (e.g., broken glass, roof damage, structural stability, etc.), allowing people to return too soon could make a bad situation worse. A significant effort was put toward getting the base to a reasonable level of safety in order to accommodate the brief return of housing residents. Major Gabriel and I were also involved in numerous discussions with base leadership concerning the ground rules for this effort. We worked with PA, FM, and others to assist the commander in communicating his message to base residents.

Given the curfews imposed by local governments, Tyndall housing residents were only allowed to return during daylight hours during the 17-22 October timeframe. This was a completely voluntary return. People had to get in, collect what they could, then depart the area before curfew. No one was allowed to remain over night. We had no services on base (e.g. no gas, no water, etc…), so people had to plan accordingly before their arrival. Nearly all recalled Tyndall personnel were ready to welcome people back, answer questions, and ensure this event was carried out as safely as possible.

One of my primary goals during this time was ensuring a claims team would be present on-base in order to address the needs of affected Air Force families. This is where the coordination I mentioned earlier, between myself and Colonel Sherwin, Lt Col Kindness, and Mr. Reese paid dividends. Mr. Reese flew in from Ohio to provide on-scene support. Colonel Lynn Sylmar and MSgt Nikki Walberg from 9 AF/JA were present every day as well. Rotating teams from Eglin and Hurlburt were sent each day in order to assist.

For five days in the Florida heat, we were able to staff a claims tent and travel into the housing areas (including the dorms) during the hours residents were allowed on base. This enabled us to provide information directly and promptly to affected personnel. We provided handouts, answered questions, and explained the claims process. Our collective claims team met with nearly 300 people to answer questions regarding the Air Force claims process. I cannot speak for every member of our JAG Corps team, but those five days are among the most rewarding days of my Air Force career. As a sidenote, opening the base and allowing residents to see the extent of the damage went a long way to temper the anger and frustration that was being directed at base leadership on social media. After viewing the massive scale of the devastation, people seemed to appreciate why the return took longer than they wished. The residents I spoke with were genuinely appreciative of the Tyndall team's efforts in this area.

When the last base housing residents departed on 21 October, Major Gabriel and I had been working 24-hour shifts, sleeping on cots, and eating MREs for over a week. More importantly, we knew additional assistance was required to meet the legal challenges ahead. As stated earlier, most of our office personnel suffered devastating damages to their homes and had personal family circumstances that prevented their return. Most would eventually receive humanitarian reassignments. However, I am eternally grateful to the first two individuals who did return. Capt Rotschafer and Capt Golseth were recalled to assist us in addressing the numerous other issues that would arise and help re-establish a functioning legal office.[7] Remarkably, aside from requiring mold remediation in a number of exterior offices, the physical legal office held up rather well. I was pleased to see that our pre-storm actions had protected the equipment and personal items left behind.

TENT CITY AND SOCIAL MEDIA

It had been a week and a half since Michael made landfall, and the base Capt Rotschafer and Capt Golseth returned to was dramatically different than the one they left. Tyndall now had all the features of life in a deployed location. Both were able to experience life in tent city before they were able to return to their homes or secure hard billeting rooms. In addition to learning the basics like eating MREs and assisting with FOD walks, their ability to directly interact with other

organizations like PA, SFS, CE, et al., is arguably the most important long-term professional development lesson. For instance, working side-by-side with PA officers on a daily basis in order to assist with crafting social media messages on behalf of the commander was an invaluable experience. This JA/PA team approach should be replicated in future exercises and, if necessary, real-world events.

LESSONS LEARNED

Tyndall faced a worst case scenario that I hope others will not have to experience, but wishful thinking is not a great strategy. History teaches us that another base will eventually confront its own Michael. Therefore, I recommend you prepare now.

FIRST, take exercises seriously. There is a tendency to see base exercises as something that must be endured before you can return to normal operations. This is a dangerous mindset. A realistic exercise scenario has the opportunity to be extremely beneficial. Hopefully, your installation has conducted a serious assessment of potential threats based on your geographic location. If you do not know what those threats are, ask around until you get the information you need.

SECOND, I would encourage additional operations training. I do not mean operations law training, which has its own place in a training program. What I am referring to is operations training that familiarizes your office with basic military skills. Do your people know what an LMR (land mobile radio) is and how to use one? Do you know the phonetic alphabet? Can you operate different types of vehicles? Do you know how to heat up your MRE without burning yourself? These are just a few of the questions you may want to ask before a crisis presents itself at your doorstep. If you do not have people on your staff with this knowledge, I recommend reaching out to other units on base (e.g. Security Forces, Civil Engineers, etc) to assist you in this area.

THIRD, print hard copies of important information. Technology is great, but if you suddenly find yourself off-the-grid for a minute, you do not want to be ineffective based on your lack of advanced planning. If your CAT and EOC binders are not up-to-date, make updating them a top priority. I recommend making extra copies for the SJA, DSJA, and LOS (at a minimum). In addition to your own base contact information, I would recommend hard copies of contact information for your MAJCOM, NAF, and other offices you might need to contact. I printed off ROSTER data, but I recommend getting emergency numbers as well. If your MAJCOM CAT representative has a consistent phone number, you need to have it written down. The SJA and others at the scene of the crisis will have limited bandwidth. In my experience, communications with ACC/JA and the on-duty CAT representative were vital as we researched and addressed issues in the earliest days of recovery efforts.

FOURTH, communication is critical. If you are the person on-site, you will need to provide information to your family, office personnel, your functional leadership, and others. Please do not forget about other JAG Corps personnel on your base, such as the ADC, SVC, or others. I tended to focus primarily on my office members and had to remind myself to include others in the information loop. I think we improved as time went on, but it can be a blind spot if you are not careful.

FINALLY, to personnel outside the affected area, your patience, compassion, and assistance is greatly appreciated. While the news cycle moves on quickly, people in the disaster area are still living with it for months and years after the last news crew leaves. I would also say that pictures alone cannot adequately convey the difficulties presented on the ground. For everyone stationed at Tyndall, everything was more difficult in the aftermath of an event like Michael. When the world around you has been destroyed, even the daily drive to and from work can be depressing. Demonstrating some appreciation for this goes a long way, especially from functional leadership. For example, I will always appreciate the visit we received from Colonel Scott Ecton and Chief Master Sergeant Thomas Hamilton (ACC/JA) the week before Christmas. Their willingness to see the challenges we were facing meant a great deal to the Tyndall team. Moreover, I believe it provided them with a perspective that can only be gained by witnessing circumstances in person.

I have tried to mention as many people as possible who assisted during the most difficult days of this experience, but I certainly cannot thank everyone who assisted me, my family, and my Tyndall teammates. I received countless emails and texts from mentors, friends and JAG Corps colleagues. Some might recommend not "bothering" someone in my position given the various time demands, but I offer the opposite perspective. Even when I could not respond, I appreciated each gesture. An experience like Hurricane Michael can be very isolating. It is nice to know that other people are out there offering thoughts and prayers.

I hope my experience with Hurricane Michael highlights certain issues and provides future potential benefits to legal teams facing similar circumstances. However, my other intent is to highlight the courage and sacrifice of the men and women at Tyndall who worked, and continue to work, under difficult circumstances to assist with Tyndall recovery efforts, especially my legal office teammates who were able to return to the fight at Tyndall, namely Major Gabriel, Capt Rotschafer, Capt Golseth, Capt Simmons, MSgt Padua, SSgt Magdeline Pike, A1C Adam Message, and Ms. Debra Monroe. It was my honor to serve with each of you.

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Tyndall Legal Office in front of damaged Hangar 5. Photo by Lt Col Daniel J. Watson, USAF

EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

ABOUT HURRICANE PREPAREDNESS

- **FEMA Video:** Important Things to Know BEFORE a Disaster
- **FEMA:** Prepare Your Organization for a Hurricane Playbook
- **Red Cross:** How to Prepare for Emergencies

ABOUT HURRICANE MICHAEL

- **National Geographic:** Hurricane Michael's Destruction
- **National Weather Service:** Hurricane Michael
- **NOAA:** Report on Hurricane Michael
- **DVIDS Video:** Tyndall, Hurricane Michael: 1 Year Later

ENDNOTES

[1] John L. Beven II, Robbie Berg, and Andrew Hagen, "National Hurricane Center Tropical Cyclone Report: Hurricane Michael (AL142018) 7-11 October 2018, National Hurricane Center, 19 April 2019, **https://www.nhc.noaa.gov/data/tcr/AL142018_Michael.pdf**.

[2] *Id.*, at 6.

[3] *Id.*, at 10. Of the 59 deaths, 16 were as a direct result of the hurricane (e.g. building collapse due to winds, drowning in storm surge) while 43 people died of indirect causes attributable to Michael (e.g. falls during post-storm cleanup, traffic accidents on wet roads, and medical issues compounded by hurricane).

[4] I want to thank the following individuals for their assistance in helping me provide on-site claims assistance to Tyndall housing residents during the 17-21 October 2018 timeframe: Mr. J.D. Reese (AFCSC), Colonel Lynn Sylmar (9 AF/JA), MSgt Nikki Walberg (9 AF/JA), Major Dustin Grant (96 TW/JA), Capt Taracina Bintliff (96 TW/JA), Capt Ashley Johnson (96 TW/JA), Capt Issac Potter (1 SOW/JA), Capt Celene Delice (1 SOW/JA), Capt Lisa Passarella (1 SOW/JA), MSgt Kalvin Johnson (96 TW/JA), TSgt Andrew Paterson (96 TW/JA), TSgt Joseph Stasiowski (96 TW/JA), SSgt Estrella Breazell (1 SOW/JA), and SSgt Lizandra Montero (96 TW/JA).

[5] See Mike Schneider, *'It's pure hell': Hurricane Michael leaves housing crisis*, AP News, 4 March 2019 **https://www.apnews.com/2cc6e4ecee694763991f6310fa87569b**.

[6] *Id.*

[7] As personal circumstances improved, we were later joined by MSgt Tara Padua, SSgt Magdeline Pike, Capt Kyle Simmons, A1C Adam Message, and Ms. Debra Monroe.

Playing the MIDFIELD

It's High Time to Recognize Law as an Instrument of National Power

BY COLONEL JEREMY S. WEBER

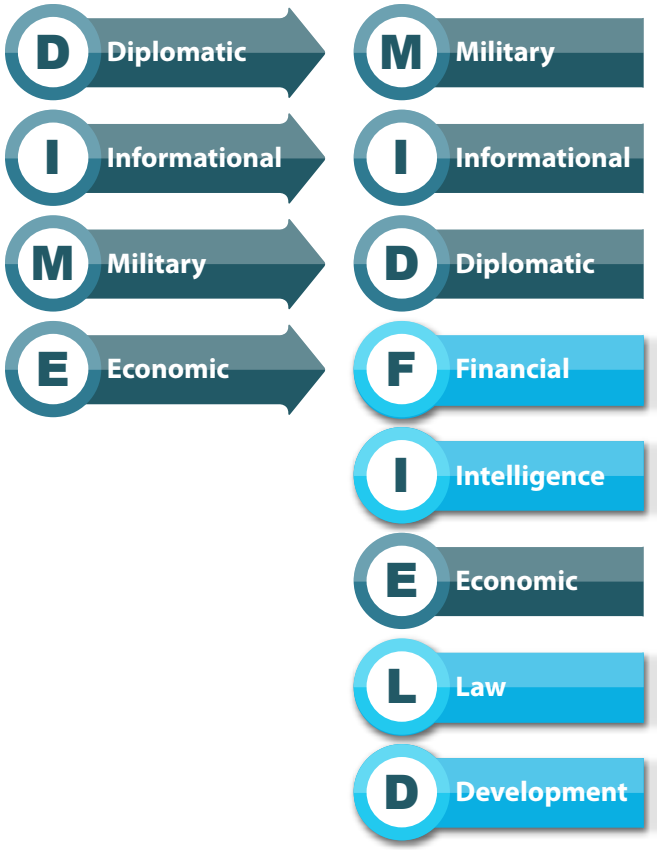
Law plays a central role in national power, and pretty much every other area of life. It is time we recognize a legal instrument of power to better incorporate the legal domain into our strategic planning.

For decades, the **DIME** framework has shaped understanding of the tools the United States controls to achieve strategic effects.[1] Nearly every strategy brief begins (and often ends) with an analysis of how to utilize America's **D**iplomatic, **I**nformational, **M**ilitary, and **E**conomic means.[2] Occasional attempts to add or modify the DIME have been put forth, but the tried-and-true DIME framework has proven resilient.[3]

However, a joint publication may mark the beginning of the end to the DIME's reign. **Joint Doctrine Note 1-18** (Strategy) proffers a new acronym—**MIDFIELD**—to describe the instruments of national power, adding financial, intelligence, law, and development weapons to the strategist's arsenal.[4] The addition of law, in particular, is long overdue. Law plays a central role in national power, and pretty much every other area of life. It is time we recognize a legal instrument of power to better incorporate the legal domain into our strategic planning.

"INSTRUMENT OF NATIONAL POWER" AND "LAW"

Does law deserve a place on the instruments of national power Mount Rushmore? To answer this, it first helps to know what "instrument of national power" means. On this point, there is surprisingly little guidance. Joint Publication 1—the central doctrinal document for the U.S. military—discusses the importance of using the instruments of national power to achieve America's strategic objectives and spells out the DIME instruments. However, it does not define the term "instrument of national power" or provide criteria as to what tools warrant the label.[5] The *DoD Dictionary of Military and Associated Terms* provides only a short and unhelpful definition that instruments of national power are the means available to the government to pursue its national objectives.[6] It thus seems that the definition is circular: strategy is the coordinated use of the instruments of national power to achieve the nation's large-scale interests, and an instrument of national power is anything that can be used to strategic effect.



DIME verses MIDFIELD

"Instrument of National Power"

For purposes of this analysis, let's define an instrument of national power as follows:

> "An instrument of national power is a resource over which the federal government can exercise a significant degree of control that, when combined with other instruments of national power, represents a significant opportunity to advance America's strategic interests on the international stage."

This definition offers three advantages. First, to qualify as an instrument of national power, the resource must be exactly that—national. In other words, it must be something the federal government has a meaningful ability to control. This definition may eliminate such purported instruments as "culture," which, as powerful as it may be, is largely outside the federal government's span of control. Second, an instrument of national power is not necessarily expected to achieve strategic effects on its own. For example, militaries might be able to conquer territory or halt enemy advances, but absent diplomatic or other efforts, militaries rarely achieve lasting strategic interests. Finally, the resource need not *guarantee* strategic success; strategy is far too complicated for certainties.[7] However, to qualify for the title of instrument of national power, the resource should be able to move the needle of strategic probabilities to a meaningful degree.

"Law"

On the subject of definitional foundations, the term "law" is not much clearer. In fact, it has been said that the term "drips with ambiguity."[8] Generally, however, the word has four meanings: (1) the *regime* that uses politically organized force or social pressure backed by force to order human activities and relations; (2) the *body* of authoritative sources issued by an organized society; (3) the *process* used to resolve controversies; and (4) some combination of the previous three.[9]

Using these definitions, the question of whether law warrants recognition as an instrument of national power focuses on whether the United States can use some combination of a legal regime, legal sources, or legal processes in combination with other instruments of national power to significantly increase its opportunity to advance its strategic interests on the international stage. If so, then law deserves a place among the DIME, MIDFIELD, or whatever other acronym one uses to describe the instruments of national power.

> Law touches everyone every day in ways seen and unseen.

THE CASE FOR A LEGAL INSTRUMENT OF NATIONAL POWER

Can law meet this test? Let's start with three basic propositions. **First, law is pervasive:** it impacts nearly every aspect of society. Law touches everyone every day in ways seen and unseen. It regulates the air we breathe, the food we eat, the clothes we wear, the roads we drive on, and the jobs we

perform. It regulates our social, political, and economic relationships. It permits certain acts, and criminalizes others. It affects us from before the cradle to after the grave. This is true of domestic American law, but it is also true of international law.[10] It stands to reason that a power so omnipresent would be a natural candidate for the title of instrument of national power.

Second, the United States unquestionably uses domestic law to achieve strategic effects within her shores. Do we want to encourage people to buy homes, or have children, or contribute to charities? Then we pass laws to provide financial incentives to do so. Do we want to encourage more corporate responsibility in product design and manufacture? Pass laws and rules that allow consumers to more easily sue for damages due to faulty products. Is drunk driving a problem? Pass tougher criminal sanctions against the act. Are we concerned about the spread of false speech or dangerous ideologies or criminal enterprises on the Internet? Pass laws that hold the Internet-based platforms responsible for policing activity on their sites. Passing laws is such an effective means of changing behavior that the United States has so much law that it literally cannot be quantified.[11] It's no wonder that the majority of U.S Presidents, Senators, and Congressional Representatives have traditionally been lawyers: domestic strategic leaders need to understand how to wield their most powerful instrument.[12]

Lastly, the joint doctrine note is not the first published work to advocate for law's rightful place as an instrument of national power. The note quotes a 2011 *Joint Force Quarterly* article that first set forth the MIDFIELD acronym:

> One of the most important additions to this new acronym is the letter L. Americans take great pride that their nation is governed by the rule of law: "Our past, and the past of every other nation, tells us that law and war were opposites, two means to resolve differences, one guided by commonly agreed-upon standards of justice, the other resolved by the calculus of power." Reaffirming the American commitment to the rule of law by simply adding it to our national security dialogue is a step in the right direction to restoring what Joseph Nye termed *soft power*….[13]

Law is a Strategic Instrument

The 2011 *JFQ* author is hardly the first to note that law's use—or misuse—can have strategic effects. In fact, the term "lawfare," popularized by the former Air Force Deputy Judge Advocate General **Maj Gen (ret) Charles J. Dunlap, Jr.**, centers on the idea that law is a strategic instrument. The term is somewhat broad, but Dunlap himself has defined it as "the use of law as a means of accomplishing what might otherwise require the application of traditional military force," though it will often be used in conjunction with military force.[14] A popular website of the same name explores ways in which law can both be used and misused in national security matters.[15]

> Exactly **how** can the federal government wield law in order to present a significant opportunity to advance America's strategic interests?

Yet all of these sources leave room for further development. Exactly *how* can the federal government wield law in order to present a significant opportunity to advance America's strategic interests? It's one thing to say that law carries powerful strategic possibilities. It's another to demonstrate how that can be done.

Law is not as obvious as the DIME instruments. It has not been traditionally considered an instrument of national power in its own right, and even today, few consider how the federal government can use law in combination with other instruments of national power to advance America's strategic interests internationally. What exactly is the case for including law among the instruments in the strategist's orchestra?

Law is not as obvious as the DIME instruments. It has not been traditionally considered an instrument of national power in its own right…

National Security Law Writing Competition

To help answer this question, the Air Force Judge Advocate General's School, with the generous support of the **JAG School Foundation**, is conducting this year's National Security Law Writing Competition on the theme of "Law as an Instrument of National Power." We seek a wide variety of essays that address specific ways in which the U.S. government can use law to achieve strategic effects. To encourage many entries that can be combined into a larger work, the writing competition has changed its rules to reduce the size of entries to 2,500-3,000 words, or roughly ten to fifteen pages double-spaced. The JAG School Foundation is also raising the number of cash prizes from two to four to encourage entries.

Law Utilized at the Strategic Level

Law offers almost endless possibilities for creating strategic effects. Dunlap, for example, provided an example from military operations in Afghanistan in 2001, when officials needed to restrict high-resolution commercial satellite imagery from falling into enemy hands. Instead of taking a military approach, officials used a "legal weapon"—a contract—to achieve this effect.[16] Yet even this example (which perhaps resided below the strategic level) may represent just the tip of the iceberg. To suggest just a few examples of how law can be utilized at the strategic level, consider the following possibilities:

"Globalization is a great thing, but it needs a legal framework in which to blossom."

- **Creating a framework for a globalized world:** Italian journalist and political analyst Loretta Napoleoni was right when she said, "Globalization is a great thing, but it needs a legal framework in which to blossom."[17] The most recent U.S. National Security Strategy may take a step back from globalization's grander ambitions,[18] but the grand arc of U.S. grand strategy since the end of World War II—and particularly since the fall of the Berlin Wall—has been to enmesh countries in a U.S.-led, rules-based international order that benefits all participants and makes major conflict less likely, thus preserving a status quo in which the United States remains the leading power.[19] A complex web of treaties, agreements, and regulations supports this international order, ensuring predictability in transactions, a common operating picture, and predictable access to the global commons. Thus, for example, a vast legal infrastructure enables safe and accessible air travel, which in turn allows a nation's citizens to travel across the globe.[20] This makes military aggression less likely both by reducing a nation's incentives to war (a nation is less likely to attack another nation in which its citizens are present) and by promoting understanding of other cultures.

- **Use of International Agreements to Establish Norms and Change Behavior:** Perhaps the most important way in which law can achieve strategic effects is through the creation and solidification of norms that can change behavior. International law may lack enforceability at times, but one thing it does particularly well is establish norms that nations come around to voluntarily complying with. A prime example is the Universal Declaration of Human Rights. One might argue that the Declaration is more of a diplomatic effort than a legal one, as it is not strictly legally binding in and of itself, but it morally commits governments around the world to secure basic human rights for their people, has led to advances in human rights, has reframed the language of international relations, has been adopted in numerous treaties and national constitutions, and is the most translated document in the world.[21] This has furthered the United States' liberal international interests, even if some

human rights violators persist and recent years have seen some backsliding.[22] One would be hard-pressed to find a predominantly military or economic approach that has achieved similar track record.[23] Lawyers have played a leading role in using the Declaration to push nations to improve their human rights record, backed up by other instruments of national power.[24] For another example, take the much-maligned Kellogg-Briand Pact of 1928.[25] The agreement purported to outlaw war, a vision ridiculed as utopian given that a world war soon followed. But recent scholarship has come to see the agreement in a much more positive light. As one important recent work found, the Pact directly led to a steep drop in international aggression since 1945.[26] In other words, the United States and others sought the most aggressive, important goal in human history—to end war—and thanks to a legal document, they largely succeeded.

- **Promoting Respect for the Rule of Law:** A less visible but perhaps no less important role for law in achieving strategic effects is the positive example respect for the rule of law can provide in reducing armed conflict and promoting stability on the international stage. As with "instrument of national power" and "law," "rule of law" remains a tricky concept; as one book put it, "The notion that the rule of law has an 'I know it when I see it' quality captures something powerful, because we do know it when we see it, and we most certainly know it when we *don't* see it."[27] However, the notion is best summarized by its two aspects: the rule of law aims at certain ends such as upholding law and order or providing predictability in human activity, and it involves institutional attributes such as comprehensive laws, functioning courts, and professional law enforcement.[28] The United States has often carries out "rule of law missions," with judge advocates playing a leading role in addressing some of the core causes of conflict.[29] After all, much of America's military involvement in countries with weak or ineffective government is really aimed at convincing people to settle their disputes through legal channels rather than violence. Yet the rule of law has an even more powerful component. As the 2011 *Joint Force Quarterly* article quoted in the Joint Doctrine Note observes, the rule of law's most powerful strategic role may come as the United States promotes the rule of law at home, setting an example for shaping the actions of other nations. The current *National Security Strategy* recognizes this; it uses the phrase "rule of law" nineteen times, including the following: "America's commitment to liberty, democracy, and the rule of law serves as an inspiration for those living under tyranny."[30]

- **Courts and law enforcement:** Law serves a valuable purpose in and of itself by establishing norms and setting an example, but it's always helpful when law can be enforced. International law comes up short to a certain degree in this respect as there is no world police, but law enforcement still can be utilized to strategic effect. The International Criminal Court, while struggling to get off the ground, has successfully prosecuted government officials for offenses such as genocide, crimes against humanity, war crimes, and aggression, and it has investigated several other such cases, providing at least the possibility of a legal mechanism that can contribute to a more stable world order.[31] As the ICC's President stated last year, "Just 30 years ago, who would have thought that crimes against humanity, war crimes and genocide would be prosecuted by an independent, permanent international institution?"[32] Likewise, the International Court of Justice has issued dozens of decisions involving disputes submitted to it along with advisory opinions.[33] Apart from international legal tribunals, domestic law enforcement can produce powerful strategic effects. Military commissions have formed a central part of the United States' strategy to combat global terrorism, even as the commissions themselves have yielded uneven results. In the United States, law enforcement agencies have yielded impressive results in criminal investigations and prosecutions of threats, counterterrorism, and homeland defense.[34] For these reasons, many have advocated that law enforcement be added to the list of instruments of national power.[35]

- **Providing a legal framework for conflict:** While the phrase *inter arma enim silent leges* (in times of war, the law falls silent) has gained popular acceptance,[36] in reality, war has become a legal battleground. To use a historical example, lawyers in the U.S. Civil War played an enormous role in shaping the underlying disputes and providing a legal justification and framework for the conflict.[37] Since that time, lawyers have taken center stage for helping make the case for war when administrations thought it was necessary. In the 2003 Iraq war, for example, lawyers staked the claim that war was justified on legal bases because of Saddam Hussein's violation of U.N. disarmament agreements.[38] Nations no longer feel free to invade others at will; the law constrains them from doing so, and they need lawyers to provide legal arguments for why war is justified, and what actions they are entitled to take.

An instrument of national power works in concert with the other instruments to contribute meaningfully to the achievement of strategic effects.

- **Law of war and shaping a better peace:** The law of war exists for strategic reasons. The purpose of the law of war is to make the successful accomplishment of the military mission possible while limiting war's unnecessary effects, thereby facilitating the restoration of peace.[39] Thus, lawyers are integral in ensuring the United States obeys the law of war, which provides international legitimacy to its war efforts and denies adversaries an avenue for undercutting U.S. and international resolve. As former Dunlap once stated, "savvy American commanders seldom go to war without their attorneys."[40] Or, as General Colin Powell said following the Gulf War, "Decisions were impacted by legal considerations at every level. Lawyers proved invaluable in the decision-making process."[41] There is little doubt that the United States, as the world's leading power and a proponent to create a rules-based international order, must scrupulously follow the law when it engages in military action. Lawyers ensure the nation does so.

CONCLUSION

Law may not be able to achieve many strategic effects on its own, but then again, neither can diplomacy, information, military action, or economic measures. An instrument of national power works in concert with the other instruments to contribute meaningfully to the achievement of strategic effects. Law provides the skeleton for a globalized world in which the United States ensures all nations participate on relatively peaceful terms. It establishes norms and changes behavior, causing even revisionist powers to couch their behavior under the legal framework the U.S.-led international order has built. U.S. respect for the rule of law encourages other nations to do the same, reducing violence. The tools for enforcing the law, while far from perfect, have come a long way and have been recognized for their strategic impact. Law provides a framework for armed conflict, and the justification for war has become a contest of legal positions. Finally, the law of war keeps a lid on war's worst tendencies, facilitating a better peace.

A good argument can be made that law is the midfield of the MIDFIELD—the centerpiece instrument of national power around which all other efforts revolve.

If the law is not an instrument of national power, then nothing is. In fact, a good argument can be made that law is the midfield of the MIDFIELD—the centerpiece instrument of national power around which all other efforts revolve. This year's National Security Law Writing Competition invites you to build upon this idea by exploring examples of how the United States can leverage law to its strategic advantage.

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[1] Donald M. Bishop, *DIME Not DiME: Time to Align the Instruments of U.S. Informational Power,* The Strategy Bridge (20 June 2018), **https://thestrategybridge.org/the-bridge/2018/6/20/dime-not-dime-time-to-align-the-instruments-of-us-informational-power**.

[2] Jeffrey W. Meiser, *Are Our Strategic Models Flawed?*, **46 Parameters No. 4, 81-91** (Winter 2016-2017) (asserting that strategists have utilized the DIME or similar frameworks as a substitute for strategic thinking, not a tool in its aid).

[3] *See id.* (noting an alternative whole-of-government approach that has been forth as DIMEFIL – diplomatic, information, military, economic, financial, intelligence, and law enforcement means); Major General William T. Lord, ***USAF Cyberspace Command: To Fly and Fight in Cyberspace***, 2 Strategic Stud. Q. vol. 3, 3, 11 (Fall 2008) (noting the standard framework as DIME-C, with the addition of culture to the traditional instruments of national power).

[4] Joint Chiefs of Staff, Joint Doctrine Note 1-18, Strategy (25 April 2018).

[5] Joint Chiefs of Staff, Joint Pub. 1, Doctrine for the Armed Forces of the United States I-1 (25 March 2013, C1 12 July 2017).

[6] Joint Chiefs of Staff, **DoD Dictionary of Military and Associated Terms** 108 (July 2019).

[7] *See, e.g.*, Colin S. Gray, *Why Strategy is Difficult*, **22 Joint Force Q.** (Summer 1999) ("[S]trategy is perilously complex by its very nature. Every element or dimension can impact all others. The nature of strategy is constant throughout history but its character continually evolves with changes in technology, society, and political ideas.")

[8] Jerome Frank, Courts on Trial: Myth and reality in American Justice 66 (1973).

[9] Bryan A. Garner, Garner's Dictionary of Modern American Usage 503 (2003) (citing Roscoe Pound, *What Constitutes a Good Legal Education*, 7 Am. L. Sch. Rev. 887, 891 (1933)).

[10] Margaret E. McGuinness, *Old W(h)ine, Old Bottles: A Reply to Professor Paulsen*, 119 Yale L.J. Online 31 (2009), **https://www.yalelawjournal.org/forum/old-whine-old-bottles-a-reply-to-professor-paulsen** (noting that international law is "everywhere" in the United States and the "ubiquity of international law and the myriad ways in which it has permeated U.S. legal, social, economic, and political life . . . .").

[11] A Senior Legal Research Specialist for the Library of Congress noted that in 1982, the Justice Department embarked on a two-year project to calculate the number of criminal laws alone, and counted about 3,000 criminal offenses covering 23,000 pages of federal law. Jeanine Cali, *Frequent Reference Question: How Many Federal Laws Are There?*, In Custodia Legis: Law Librarians of Congress (12 March 2003), **https://blogs.loc.gov/law/2013/03/frequent-reference-question-how-many-federal-laws-are-there/**. A popular Twitter feed posts "A Crime a Day," consisting of obscure offenses that criminalize oddly specific behavior. **https://twitter.com/crimeaday?lang=en** (last visited 27 September 2019).

[12] *See* Norman Gross, *Presidential Bar Leaders: Fascinating Facts About America's Lawyer-Presidents*, ABA Bar Leader (January-February 2010), **https://www.americanbar.org/groups/bar_services/publications/bar_leader/2009_10/january_february/presidential/** (noting that, at the time of publication, 26 of the country's 44 presidents had been attorneys); Justin Fox, *Maybe Washington Does Need More Lawyers*, Bloomberg Opinion (8 March 2019), **https://www.bloomberg.com/opinion/articles/2019-03-08/congress-might-need-more-lawyers** (reporting that historically, a majority of both houses of Congress was composed of lawyers, though the number of Representatives has been below 50 percent since the 1970s and is steadily to about 30 percent, while the Senate attorney population has just recently fallen below 50 percent for apparently the first time in its history.) A 2017 *Harvard Business Review* study of 3,500 corporate chief executive officers found that nine percent (9%) were attorneys, and that these CEOs were better at managing litigation risk. M. Todd Henderson, *Do Lawyers Make Better CEOs than MBAs?*, Harv. Bus. Rev. (24 August 2017, updated 30 October 2017), **https://hbr.org/2017/08/do-lawyers-make-better-ceos-than-mbas**.

[13] Peter C. Philips and Charles S. Corcoran, *Harnessing America's Power: A U.S. National Security Structure for the 21st Century*, 63 Joint Force Q. (4th quarter 2011), at 40 (quoting David Rothkopf, Running the World: The Inside Story of the National Security Council and the Architects of American Power 463 (2005) and citing Joseph Nye, Soft Power: The Means to Success in World Politics x (2004)).

[14] Maj Gen (Ret.) Charles Dunlap, Jr., *Lawfare 101: A Primer*, Mil. Rev. (May-June 2017), **https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/May-June-2017/Dunlap-Lawfare-101/**.

[15] For an overview of the Lawfare site's understanding of the term and the site's purpose, see *About Lawfare: A Brief History of the Term and the Site*, Lawfare, **https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site**.

[16] Maj Gen (Ret.) Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, Yale J. Int'l Affairs 146, 147 (Winter 2008).

[17] *Globalization and 'Rogue' Economics*, Newsweek (22 April 2008), **https://www.newsweek.com/globalization-and-rogue-economics-86049**.

[18] *See National Security Strategy of the United States of America* 2-3 (December 2017):

> We stood by while countries exploited the international institutions we helped to build.... These competitions require the United States to rethink the policies of the past two decades—policies based on the assumption that engagement with rivals and their inclusion in international institutions and global commerce would turn them into benign actors and trustworthy actors. For the most part, this premise turned out to be false.

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[20] *See generally* Raymond C. Speciale, Fundamentals of Aviation Law (2006) (summarizing domestic and international law affecting air travel).

[21] *A New World Record: Universal Declaration in 370 Languages*, United Nations Human Rights: Office of the High Commissioner (23 April 2010), **https://www.ohchr.org/EN/NewsEvents/Pages/AnewworldrecordUDHR.aspx**.

[22] For a look at the state of human rights across the world, *see World Report 2019*, Human Rights Watch, https://www.hrw.org/world-report/2019. The report characterized the current era as "a dark time for human rights," even as it noted encouraging developments in resistance to autocrats. *Id.* at 1-2.

[23] *See* Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights 236 (2001):

> The Declaration's moral authority has made itself felt in a variety of ways. The most impressive advances in human rights—the fall of apartheid in South Africa and the collapse of the Eastern European totalitarian regimes—owe more to the moral beacon of the Declaration than to the many covenants and treaties that are now in force. Its nonbinding principles, carried far and wide by activists and modern communications, have vaulted over the political and legal barriers that impede efforts to establish international enforcement mechanisms. Most, though not all, flagrant and repeated instances of rights abuse are now brought to light, and most governments now go to great lengths to avoid being blacklisted as notorious violators. Extreme suffering and deprivation—whether due to human or natural causes—often, though not often enough, elicit practical responses.

[24] *See generally* Jerome J. Shestack, *Lawyers' Role in Human Rights*, 84 A.B.A. J. 8 (1998) (summarizing efforts lawyers have undertaken to promote human rights internationally).

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[28] Rachel Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners* 3, Carnegie Endowment for Int'l Peace (21 January 2005), **https://carnegieendowment.org/files/CP55.Belton.FINAL.pdf**.

[29] *See generally* The Judge Advocate General's Legal Center and School Center for Law and Military Operations, Rule of Law Handbook: A Practitioner's Guide for Judge Advocates (2015), **https://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2015.pdf** (providing a detailed look at the role of rule of law operations, their legal framework, the institutional and social context of such missions, the key players in these operations, planning for rule of law operations, fiscal considerations, resources and enablers for rule of law missions, and recent operational experiences in Afghanistan.

[30] *National Security Strategy of the United States of America*, *supra* note 18, at 4.

[31] For a list of convictions obtained by the Court, see Int'l Ct. of Just., **https://www.icc-cpi.int/Pages/cases.aspx**.

[32] Judge San-Hyun Song, *Past Achievements and Future Challenges of the ICC*, Keynote Speech of the 20th Anniversary of the Rome Statute, **https://www.icc-cpi.int/itemsDocuments/20a-ceremony/20180717-sang-speech.pdf**.

[33] For a complete list of the Court's opinions in disputes along with advisory opinions, see Int'l Ct. of Just., **https://www.icj-cij.org/en/list-of-all-cases**.

[34] *See generally* Ronnie S. Catipon, *Law Enforcement as an Instrument of National Power*, The Foreign Service Journal, **https://www.afsa.org/law-enforcement-instrument-national-power**.

[35] *See, e.g.*, Christopher Goodyear et. al., *Countering Threat Networks: A Standard Lines of Effort Model*, Small Wars J. (XXXX). **https://smallwarsjournal.com/jrnl/art/countering-threat-networks-a-standard-lines-of-effort-model** (arguing that the DIMEFUL acronym, including law enforcement, "better captures the full range of instruments of national power.")

[36] The phrase is generally attributed to the Roman statesman Marcus Tullius Cicero in his oration *Pro Milone*. Lee Epstein et. al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. Rev. 1, 3 n.6 (2005).

[37] *See generally* Peter C. Hoffer, Uncivil Warriors: The Lawyers' Civil War (2018) (detailing how lawyers found themselves at the center of the Civil War, as they worked to make sense of the conflict and shaped the legal arguments in favor of the Union's actions.)

[38] *The Case for War*, The Economist (1 August 2002), **https://www.economist.com/leaders/2002/08/01/the-case-for-war**.

[39] *See* U.S. Dep't of Def., Office of General Counsel, Department of Defense Law of War Manual para. 1.3.4 (June 2015) (setting forth the purposes of the law of war, including restoration of peace).

[40] Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (November 2001), at 6, **https://scholarship.law.duke.edu/faculty_scholarship/3500/**.

[41] Steven Keeva, *Lawyers in the War R*oom, 77 A.B.A. J. 52 (December 1991).

Avoiding Voir Dire Pitfalls

BY LIEUTENANT COLONEL WILLIE (WILL) J. BABOR

The age-old maxim that there is never a second chance to give a good first impression rings true in *voir dire*.

The Military Judge finishes the preliminary instructions and her *voir dire* and asks, "Do counsel for either side desire to question the court members?" What happens next often sets the tone for the remainder of the court-martial. The age-old maxim that there is never a second chance to give a good first impression rings true in *voir dire*. Will you and your team come off as polished, professional attorneys who have put in countless hours to prepare your case? Or will this phase of the trial leave the members questioning your capabilities, credibility, and preparedness? A large part of the answer depends on the work you put into your *voir dire* on every case.

Preparation for and effective execution of *voir dire* in the military courtroom must include an examination of the applicable rules and controlling case law, development of a coherent strategy, and practical preparation for the delivery to the members. This article will provide guidance and some best practices you can employ in your next case.

MANUAL FOR COURTS-MARTIAL (M.C.M.)

As with every endeavor at court-martial, an examination of the *voir dire* process must begin with the M.C.M. In particular, you should be aware of the impanelment procedures as detailed in Rules for Courts-Martial (R.C.M.) 912 and 912A as well as the implications those rules have on *voir dire* practice. As for the art of *voir dire*, R.C.M. 912(d) and the discussion thereto provide the purpose for *voir dire* at courts-martial: to obtain information for the intelligent exercise of challenges. Deciding what this means for your case and your presentation of *voir dire* is subject to the interpretation of the military judge, who maintains relatively unfettered control over the *voir dire* process.[1] For example, more permissive military judges may allow you to weave case theme and theory into *voir dire*, while less lenient military judges may require direct correlation to a grounds for challenge under R.C.M. 912(f)(1). There are also military judges who may not allow you to ask any questions at all. A best practice to determine your military judge's preference is to address this issue during the initial R.C.M. 802 scheduling session.

LEGAL FRAMEWORK

In addition to the guidance found in the M.C.M., you must have an understanding of the legal standards to evaluate and sustain challenges as well as the limits on using peremptory challenges. In terms of the overarching purpose of *voir dire*, the **Court of Appeals for the Armed Forces** has consistently held that members must be excused for cause when it appears that their service would raise substantial doubt as to the legality, fairness and impartiality of the court-martial proceedings.[2] The Court has further held that substantial doubt arises when, in the eyes of the public, the challenged member's circumstances do injury to the perception or appearance of fairness in the military justice system.[3]

> The test for implied bias is objective and considers the public's perception or the appearance of fairness in having a particular member serve as part of the panel.

Challenges for cause using the tests for actual and implied bias are the mechanisms to ensure legality, fairness, and impartiality in the member selection process.[4] The test for actual bias is subjective and considers whether a member's bias will not yield to the evidence presented or the military judge's instructions.[5] In practice, actual bias is often readily apparent; typically the member will affirm she or he is unwilling or unable to set aside a belief or past experience, even if called upon to do so by the military judge. The test for implied bias is objective and considers the public's perception or the appearance of fairness in having a particular member serve as part of the panel.[6] To effectively build challenges for cause based upon implied bias, you should ask open-ended questions that elicit sufficient testimony on which the military judge can base a decision. You should also take detailed notes of the challenged member's demeanor during the questioning to highlight during subsequent argument. Finally, you must be aware that the military judge is required to apply the liberal grant mandate to challenges by the defense.[7] The liberal grant mandate, which has been in effect since the promulgation of the M.C.M., enables military judges to fulfill their responsibility of preventing both the reality and the appearance of bias involving potential court members.[8] You should be able to argue for and against the application of the mandate by providing the military judge information and advocacy focusing on the appearance, expressions, and attitude of the challenged member.

As a best practice in exercising challenges for cause, you should: (1) know the difference between actual and implied bias and how the tests for each impact your ability to advocate for the retention or challenge of a member; (2) understand how the liberal grant mandate impacts your argument; and, (3) not pursue challenges on actual bias when there is no supporting evidence.

In light of the legislative changes, a noteworthy change to the impanelment process comes after the exercise of challenges for cause. Once challenges for cause have been exhausted, the remaining members are now assigned random numbers by inputting their rank and names into the random number generator.[9] The generator assigns a random number to each member starting at one and continuing until all members have a number. After being numbered, the decision as to the exercise or non-exercise of the peremptory challenge is undertaken.[10] Under the old rules peremptory challenges would be used immediately after challenges for cause were decided and the panel that remained would be seated, so long as quorum was maintained. Now, you are no longer required to play the "numbers game" with the new rules and can now establish new parameters for the optimal use of challenges.[11] Nevertheless, the new rules do require some additional thought regarding the use of peremptory challenges. In practice, this means that the potential member you have targeted for the use of your peremptory challenge could be assigned a high number, and thus not selected for service on the panel. Given this new wrinkle, you should be contemplating a primary and alternate peremptory selection based upon the outcome of the random number assignment.

The use of the peremptory challenge, however, is not without restriction. You must be prepared to justify your use of a peremptory challenge if the military judge or opposing party questions whether the challenge was made on the basis of the challenged member's race or gender.[12] Importantly though, simply providing a race or gender neutral justification alone is not sufficient to meet this threshold and you need to be prepared to cite the challenged member's responses to *voir dire* questions, their demeanor or physical reactions in the courtroom, and other pertinent information.[13] Finally, defense counsel have an additional burden in that they must consider whether the use of a peremptory challenge on a previously challenged for cause member is worth waiving review of the denial of the challenge.[14]

Your *voir dire* as a whole, as well as each question, should be strategically aimed at an outcome that furthers your case.

STRATEGIC DEVELOPMENT

After reviewing the rules and relevant case law you should then start developing your *voir dire* by asking "why?". Your *voir dire* as a whole, as well as each question, should be strategically aimed at an outcome that furthers your case. More basically, understanding why you are asking a particular question might ultimately lead to the realization that the question is not useful or, in some cases, counter-productive to your aims. Using "why?" as your barometer should eliminate unnecessary questions and fine-tune ambiguous questions, both outcomes that will build credibility with the panel.

The concept of bias, as discussed above, should also be built into the strategic development of your *voir dire*. If you believe a certain issue is likely to shape the case, for example a personal opinion as to the recreational use of illicit drugs; this issue should be the highlight of your *voir dire*. When you have made the decision to highlight an important issue you should then develop questions intended to elicit evidence of bias by members to best suit the needs of your case. Sticking with the example above, savvy counsel would have the entire panel affirm that recreational drug use has no place in the Air Force, but would follow-up with questions regarding potential views on changing drug laws in civilian society and whether members believe these changes should impact the military. An effective advocate, whether trial counsel or defense, should be able to build a challenge for cause or rehabilitate a member, depending on your strategy, who answers the follow-up question affirmatively.

A well-developed *voir dire* question can both elicit information for the intelligent exercise of a challenge and also serve as a foot-stomping reminder during a findings argument.

The strategic use of theme and theory in presenting your case is effective throughout all phases of the trial and *voir dire* is no exception. A well-developed *voir dire* question can both elicit information for the intelligent exercise of a challenge and also serve as a foot-stomping reminder during a findings argument.[15] Weaving your theme and theory into *voir dire*, however, must conform in some manner with the requirements of R.C.M. 912(d). Put simply, asking a question that highlights your theme and theory, but that does not attempt to elicit a basis for a challenge should not be asked.

HOW TO START

In terms of putting pen to paper, many of you will begin by searching the "shared drive" for old submissions you or your peers have used in similar cases. While there is nothing wrong with using tried and true *voir dire* questions, you should treat each question in a recycled document as if you were creating it for the first time for use in your current case.

A better practice is to review the military judge's questions first and then more thoroughly develop lines of questions.

One recycled, but more reliable, document that counsel often forget to reference is the Military Judges' Benchbook.[16] The questions therein are guaranteed to be asked every trial, yet counsel submit, with regularity, exact copies of the military judge's questions or questions that very closely replicate them. A better practice is to review the military judge's questions first and then more thoroughly develop lines of questions. If there are questions you want to ask that are similar to those the military judge asks, then ask the military judge to adjust the questions to capture the additional aspect you are looking to discover. One good example of this practice would be if you want to know if a member of the venire has a close friend who was charged with an offense similar to that charged at the court-martial. Counsel often ask, "I know the military judge just asked you 'if anyone or any member of your family has ever been charged with an offense similar to any of those charged in this case,' but now I would like to ask if any *friend or close acquaintance* has ever been charged with a similar offense?" Instead of this line of inquiry, simply ask the military judge to add the terms "friend or close acquaintance" to your question. This bit of foresight will reduce the potential for confusion and the likelihood the members might hold such a small difference in the questions against you and your team.

FOLLOW-UP QUESTIONS

As you develop your questions you will likely have a desired answer for a member you would want to retain and, similarly, an answer for a member you would want to challenge. Much of the time, however, counsel fail to prepare necessary follow-up questions to ask after drafted *voir dire* questions elicit the anticipated responses. You need to have the follow-up questions thought out and ready in order to rehabilitate the member or to build your case for challenge. Rarely do members' answers to initial questions from counsel form the basis for challenge, which is why previously developed follow-up questions are so important. Additionally, the follow-up questions should be tailored to apply in a group setting or in individual *voir dire* depending on the nature of the question. Successful attempts to rehabilitate a member will always include, at a minimum, whether the member will follow the military judge's instructions, whether the member will make their decision based on the evidence in court and not their personal experience or opinion, and whether the member will give the accused a full, fair, and impartial hearing. A best practice is to have the follow-up questions on the same document you are delivering your *voir dire* from as it will be obvious to the members and the military judge if you are trying to improvise follow-up rehabilitation questions and thus, potentially impact your credibility.

Rarely do members' answers to initial questions from counsel form the basis for challenge, which is why previously developed follow-up questions are so important.

For sensitive follow-up questions you should be prepared to ask the military judge to bring individual members back without calling attention to the individual member's answer while sitting in general *voir dire*. Understanding the military judge's preference for the manner in which questioning is curtailed during general *voir dire* is a good discussion point for the R.C.M. 802 conference the morning of trial. In regard to follow-up questioning during individual *voir dire*, you should consider and develop a reasonable position as to whether the member should serve on the panel before asking rehabilitative questions. Often counsel expose potential members to unduly embarrassing follow-up questions when it is clear to all parties that the member should not serve on the panel. Many military judges will signal a member will not be recalled for individual *voir dire* and also will not serve on the panel by saying they intend on recalling members X, Y, and Z but that they do not believe there is any need to question members A and B. Counsel should be aware if

A and B have given information that indicates a bias then the military judge is signaling that A and B are likely off the panel. If the military judge does not make such a signal, then counsel may push for it by saying, "I do not believe there is any reason to further question A and B. However, if the Court believes additional questions are required, I would follow up with a few additional questions." In either event, you should not lose the opportunity to shape your panel by losing a challenge for failing to ask questions in individual *voir dire*. You should also considering conferring with opposing counsel to determine whether they will object to a potential challenge on your part.

A best practice for all questions, whether newly drafted or used in the past, is to read them out loud more than once…. Another helpful technique in assessing whether questions are too long, confusing, or inconsistent with your goals is to ask someone who is not involved in the case to answer them.

DELIVERY

One common pitfall during *voir dire* is when counsel reads a long or confusing question and it becomes clear that is the first time they have read the question aloud. Often, when drafting new or uniquely tailored questions, the written intent doesn't always come through in the oral delivery. A best practice for all questions, whether newly drafted or used in the past, is to read them out loud more than once. Another helpful technique in assessing whether questions are too long, confusing, or inconsistent with your goals is to ask someone who is not involved in the case to answer them. This practice can be conducted using friends or family members who don't know a lot about the case. You should ask them both for their answer to your question as well as how they thought the question sounded when you read it. Having a layperson's perspective is often more helpful than that of your co-counsel or expert consultant.

After you have completed the development of your substantive questions you should consider the manner and method in which you will introduce your team and, additionally for defense counsel, your client. Many military judges will limit your introductions and you should always be wary of bolstering your reputation and needlessly testifying. A simple introduction of who you and your co-counsel are as well as where you are assigned is often sufficient, there is no need to provide a detailed description of your professional qualifications or information about your family.

Additionally, your physical delivery and demeanor are often overlooked aspects of *voir dire* delivery.

Additionally, your physical delivery and demeanor are often overlooked aspects of *voir dire* delivery. Your body language, tone, and tenor are all characteristics of delivery that can be developed and evaluated by your team to enhance your *voir dire* performance. Many civilian practitioners opt for a non-traditional, relaxed delivery, often asking questions of the venire while standing away from the podium and close to the box. Proponents of this technique argue it allows the lawyer to build a connection to the panel member. While this technique has many advocates in civilian jurisdictions, Air Force counsel should carefully examine whether such a delivery would serve to build a connection, or rather, be viewed as a breach of military etiquette by the members. A best practice before leaving the podium and engaging in non-traditional *voir dire* delivery is to discuss it first with your military judge, she or he may have particularly strong feelings on the practice.

Finally, presenting *voir dire* can feel unnatural for many counsel. If you cannot pull off taking detailed notes while at the podium handling the questioning, have your co-counsel

or paralegal in the courtroom in charge of taking detailed notes. Then before deciding on individual *voir dire* or challenges request a break to discuss the matter with your co-counsel or paralegal.

> *Voir dire* is a first chance to make an impression with the panel.

CONCLUSION

Along with the resources contained within your respective litigation communities, there are external resources which should guide *voir dire* development. Lexis Advance offers several primers on *voir dire*, most notably the Criminal Law Advocacy[17] as well as Criminal Defense Techniques[18] chapters on *voir dire*. Additionally, you should leverage memberships within their professional organizations, including the National District Attorneys Association or the National Association of Criminal Defense Lawyers, to further develop their general litigation acumen.

Voir dire is a first chance to make an impression with the panel. Well prepared and professionally asked questions based on the rules, grounded in case strategy, and effectively practiced can establish rapport with the panel members who will decide the fate of your case, it's simply up to you to put in the work.

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ENDNOTES

[1] Manual for Courts-Martial, United States, R.C.M. 801(a)(3); R.C.M. 802(a), Discussion; and R.C.M 912(d), Discussion (2019) [hereinafter MCM].

[2] United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017).

[3] *Id.*

[4] United States v. Clay, 64 M.J. 274, 276 (C.A.A.F. 2007).

[5] United States v. Warden, 51 M.J. 78, 81 (C.A.A.F. 1999).

[6] United States v. Peters, 74 M.J. 31, 34 (C.A.A.F. 2015).

[7] United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005).

[8] *Clay*, 64 M.J. at 277.

[9] **https://www.jagcnet.army.mil/RandomNumberGenerator/index.html**

[10] MCM, *supra* note 1, R.C.M. 912(f)(5).

[11] United States v. Newson, 29 M.J. 17 (C.M.A. 1989) (A good discussion of the "numbers game.").

[12] United States v. Powell, 55 M.J. 633, 641 (A.F. Ct. Crim. App. 2001).

[13] United States v. Hurn, 55 M.J. 446, 448 (C.A.A.F. 2001).

[14] MCM, *supra* note 1, R.C.M. 912(f)(4).

[15] A practice tip is to consult your military judge before citing your *voir dire* questions in subsequent argument as military judges may differ on acceptance.

[16] U.S. Dep't of Army, Pam 27-9, Legal Services: Military Judges' Benchbook (9 Aug 2019).

[17] 3 Criminal Law Advocacy, Chapters 50 through 58, (2019).

[18] 1A Criminal Defense Techniques § 21.16 (2019).

The Captain's Choice

BY LIEUTENANT COLONEL MATTHEW E. DUNHAM

He decided his best choice was to go it alone… **spoiler alert** not the best choice.

Captain Drake Williams flopped into his Ikea armchair after a particularly tough day and started feeling sorry for himself. He joined the JAG Corps one year, one month and six days ago, and as he sipped a craft beer, he indulged his negative emotions and began to second-guess that decision. Hadn't he asked for a location in the Northwest, close to family and his mountains? Instead, he got the Deep South. Flat, humid, hurricanes, pathetic coffee options—definitely not on his list. Hadn't he done well in officer training? Sure, there had been the feinted outrage over uniform "cables" and getting "341" demerits for whatever reason the Cadre invented, but that was part of the training, and he had been ready for it. Hadn't he excelled during the nine-week Judge Advocate Staff Officer Course, affectionately known as JASOC? He received good marks, made friends and was well liked by the instructors. The problem, he decided, was his office, and he began to stew.

DAY ONE – THE NEW JAG

When he first reported to his base, a court-martial had the place buzzing. Another captain eventually realized he was there. "We thought you were one of the witnesses, sorry about that," she said in her defense, and then whisked him around the office. "This is our new JAG," she had announced with minimal enthusiasm. Duty complete, she deposited him in his government-issued office. "This is you. I'll tell the SJA you're here." Lieutenant Colonel Clive Jones, the Staff Judge Advocate, asked about his background and provided some basic expectations. He said he had an open door policy and to come to him with any issue. Then, just like the recruiter promised, immediate responsibility from day one.

No one really showed him what to do or how to do it, at least not to his satisfaction.

As Chief of General Law, he herded the legal "cats and dogs." Only no one really showed him what to do or how to do it, at least not to his satisfaction. Major Eve Vonn, the Deputy SJA, was deployed, and though the other captains offered to assist, he did not want them to think he couldn't hack it. Plus, they had their own work to do. Lt Col Jones was

approachable, but going to his office with issues just invited questions. Usually, the result was Jones sending him to do more research. It was so frustrating because he knew the man had the answers. On top of weekly training sessions, a heavy workload, courts and legal assistance clients, didn't Jones realize he needed to resolve taskers faster? He just didn't have time to deal with such an old-school "teach a man to fish" philosophy.

GO IT ALONE AND HOPE FOR THE BEST

He decided his best choice was to go it alone and hope for the best. He hid his insecurity by relying on past work product and templates. He also used his "officer" status to delegate projects to his paralegals. Of course, he made a concerted effort not to give off the "I'm above you" vibe. He thought it was going well, so he didn't see it coming.

He thought it was going well, so he didn't see it coming.

Being summoned to Lt Col Jones' office and reamed out for fifteen minutes had been humiliating. Jones had been livid after learning an important legal review went to the Wing Commander without his knowledge. Worse, the opinion cited the wrong law and the higher headquarters SJA caught it. When he offered to take care of matter with the paralegal who wrote the opinion, Jones just got more upset. Even now, he still didn't understand why Jones had been so unreasonable. Since then, he had to get the SJA to "concur" and co-sign everything he wrote, and Jones wielded a red pen like Inigo Montoya fighting the six-fingered man. It was insulting. Hadn't Jones read his bio? He had been on law review.

DOWNHILL FROM THERE

It went downhill from there. Taskers came back for revision multiple times and took forever to close out. The paralegals resented him, and he was always being interrupted to do legal assistance for free-loader "clients" who just wasted his time. It seems they only wanted to talk about the Air Force "back in the day," or set up a trust for a pet rat, or go on and on about how they were getting a raw deal in some Jerry Springer-type scenario. Even when he tried to block off time to work his courts, he'd have to stop for a meeting, to work some special tasker, or attend some mandatory fun event.

He was overwhelmed and frustrated. Why couldn't he catch a break?

More recently, there had been an uptick in courts, but he felt he had more than his fair share. Sure, he still wasn't certified but that was hardly his fault. He'd prepared the sentencing case for a drug court early on, but the Accused was acquitted. Weeks of prep just to read the script. He worked two other cases, but one didn't go to court when the victim elected not to participate two days before trial, and an eleventh-hour Chapter 4 discharge kept him out of the courtroom in his other case. Now, he had another drug case, a rape case, and a sexual assault case, all difficult and all supposedly going to trial in the next two months. Many of his JASOC friends were jealous of his caseload, but he was less than thrilled. He was overwhelmed and frustrated. Why couldn't he catch a break?

IN SEARCH OF AN ALLY

Then yesterday, after several of his overdue taskers were highlighted in the weekly staff meeting, he went to Maj Vonn, finally back from deployment, in search of an ally. It went sideways.

"I don't know what more I can do; nothing I do seems to be good enough," he'd blurted after closing the door.

Vonn seemed like she had been waiting for this. "Capt Williams, I'm not going to commiserate with you. This is a challenging job, but unless you learn to organize and prioritize, you're going to continue falling behind. Also, you need to own your mistakes, learn from them, and kick it up a notch. You're one of our veteran captains, but you're not using your trial-prep time wisely, and we're still returning your work product for proofreading errors."

> This is a challenging job, but unless you learn to organize and prioritize, you're going to continue falling behind. Also, you need to own your mistakes, learn from them, and kick it up a notch.

In retrospect, he wished he hadn't been defensive. He certainly wished he hadn't gone emotional, and the thought made him shift uncomfortably in his efficiently designed armchair.

"Kick it up a notch! Seriously? You haven't been here. Do you even know what's on my plate? I'm being pulled in a million directions, always putting out fires and nothing I do is ever good enough," he blubbered. "I'm organizing the deployment lines by myself, working three investigations, I have three courts with three different Senior Trial Counsel breathing down my neck, I do more legal assistance than anyone else, and I don't think the other Captains pull their weight..." He remembered his words trailing off, muffled by the clump of soggy tissues pressed into his face.

"Why don't you call it a day?" Vonn mercifully suggested. On his way home he realized he left his ID card in his computer. Just perfect.

As he nursed his craft beer, still cold in his stainless steel double-walled tumbler, he calculated his time in the Air Force—one year, one month and six days. He felt stuck, miserable, not in control of anything. He wished it was different, but he didn't know how it could be. He needed a sympathetic ear and advice.

A SYMPATHETIC EAR AND ADVICE

Thumbing through phone contacts, he stopped at "Prof. Sofia Russell." Dr. Russell had been his mentor and favorite law school professor. She was a retired O-6 JAG and had written him an excellent reference letter. It was she who got him interested in the JAG Corps in the first place. His thumb hovered over the "call" icon for a second. It was still early on the west coast, he thought, and tapped the screen.

Dr. Russell was glad to hear from him. She listened intently as he caught her up on his last year, offering an occasional "Mm-hmm." He lamented his busy caseload, not having someone to bring through him every aspect of his job, his boss' personality, etc. When he finished, he asked her what he could do. Her reply was unexpected.

"Drake, it sounds like you want your boss, colleagues and responsibilities to conform to your expectations and desires, and work at your pace. That's just not reasonable."

"Wait…what?" he said too quickly. "It's not reasonable for me to be satisfied at work?"

> You can't always control what happens around you, or even to you, but in every situation you always have a choice to make.

"No, that's not what I said," Dr. Russell replied. "I'm saying you can't always control what happens around you, or even to you, but in every situation you always have a choice to make."

"It doesn't seem like I have choices," he reacted. "I'm stuck where I'm at. I didn't choose the Deep South. I didn't choose to have tons of difficult cases. I didn't choose to have a demanding boss. I mean…I signed on the dotted line, so I'll see it through, but it's not what I expected."

"You're right, you did not directly cause or choose those things," Dr. Russell conceded. He felt a slight vindication. Then she kept going.

"However, you have absolute freedom to choose how you will respond to those situations. You can choose to play the victim, wallowing in self-pity, excusing yourself and blaming others, or you can choose a different course…a more constructive reaction."

You can choose a different course… a more constructive reaction.

That stung, and he felt a little chastised. "Like what," he probed, more gently this time.

"Well, take that example of the legal review you didn't coordinate through your SJA. Your first reaction was to blame your paralegals. No wonder they resent you; you threw them under the bus. Instead, you might have chosen to take responsibility. If you had, you would have shown them you have their back maybe earned their loyalty."

"Hmm," he grunted as he reflected back a little more honestly this time. He sat on the edge of his chair with his elbow on his knee, pinching his forehead with his free hand.

She continued, "You also could have chosen to give a *mea culpa* to your boss for not coordinating the legal review and then used the opportunity to ask him about the process. I bet a little humility on your part would have drastically changed how that situation played out."

"Okay, I see what you're saying about my paralegals," he admitted. "You're probably right, there. But my SJA is really difficult. He never really helps when I ask."

"Hmmm," she murmured with a touch of incredulity. "Whether he's difficult or easy, whether you like him or not, your focus needs to be on what you can control—you. It's your choice how you react to him," she said.

He didn't say anything so Dr. Russell asked, "have you thought about why you find him so difficult?"

"Not really. He just is. He's too demanding and doesn't seem to care about what I have to get done."

THE PROBLEM WITH MAKING ASSUMPTIONS

"But based on what you said, he told you he has an open door policy and to come to him with issues," Dr. Russell noted. "It sounds to me like you resist him because what you really want are quick answers to your problems. But I'm guessing that's not what he wants. Think about it, if he's giving you the solution, he might as well be doing it himself, right? You're looking at it wrong. I'd say he's empowering you to come up with solutions, and if I remember right, immediate responsibility was one of those things that attracted you to the JAG Corps."

"But I have so much work to do," he said, attempting to justify himself. "I don't have time to listen to his lectures and figure out what he already knows. It's like he knows how to win, but refuses to let us in on it."

Dr. Russell stopped him cold. "First of all, if he has the time, shouldn't you find the time to listen to him? Second, why are you so confident he knows the exact answers to your questions? He's just one person. Sure, he has more experience than you but he's not all-knowing. He might not know. Did you ever think that he might be looking to you, a qualified attorney and member of his staff, to do the research and analysis and come up with options?"

His silence betrayed his thoughts. "You've made assumptions about his motivations and chosen your immediate problem and your convenience over his bigger picture. That's lose-lose, Drake. You work for him; it's not the other way around. I bet if you swallow your pride a little and commit yourself to learning from him, it will pay out double for you."

"I haven't looked at it like that before," he said reflectively. "But practically, how can I do that when I'm drowning in legal assistance clients? What about my colleagues who don't pull their weight? Those things bog me down."

> Bottom line, it's your choice how you react, and your choice has a massive impact on the outcome.

"Drake, it's the same thing," Dr. Russell reinforced. "Don't concentrate on things outside your control. That only fuels your pride, and it invites self-pity and resentment when you fail. Again, focus on what you can control. Specifically, your reaction. When faced with a tough legal assistance client, you can choose to help, however simplistic the problem, or you can choose to be irritated about it and try to get them out of your office as fast as possible. If a colleague is the issue, you can choose to see them as a burden, or you can choose to invest in them so they become a valued member of a team. Bottom line, it's your choice how you react, and your choice has a massive impact on the outcome."

> When he hung up the phone, he certainly didn't have it all figured out, but he definitely felt like he had a new perspective.

He talked with Dr. Russell for about an hour. When he hung up the phone, he certainly didn't have it all figured out, but he definitely felt like he had a new perspective. Dr. Russell was absolutely right. He needed to be done with the self-pity, and he resolved to make deliberate choices in response to difficult situations and events.

NEW PERSPECTIVE

Over the next weeks and months, he implemented his new outlook. He started by apologizing to his team, and he promised to have their backs from now on. Their immediate reaction was tepid, but when they realized he was sincere, morale soared. He also chose to approach challenging issues and problems as opportunities. Dr. Russell had advised him to stop focusing on avoiding mistakes and instead, focus on doing each task with excellence. She had correctly observed that when people focus on avoiding mistakes, they tend to make even more mistakes, which ultimately leads to a lack of decision-making and task failure. All it took for him to implement this concept was diligence and a little courage. He dug into details and made deliberate decisions. Inevitably, by focusing on excellence, he uncovered nuances, became an expert in whatever problem he worked, and on a few occasions, he even found innovative solutions.

> Stop focusing on avoiding mistakes and instead, focus on doing each task with excellence.

He also decided to embrace Lt Col Jones' philosophy. Instead of going in with questions about issues, he determined to back-brief Lt Col Jones on the issue, provide a summary and analysis of the relevant facts and law, and present options and his recommendation. At first, Lt Col Jones still asked a lot of questions. However, he chose not to view running down the answers as the incessant demands of a tyrannical boss. Rather, he viewed it as an opportunity to learn and improve his legal advice. It made him a better lawyer, and as he got better at briefing his boss, he sensed Lt Col Jones' trust growing. It wasn't too long before Lt Col Jones would approve his recommendations with a "sounds good, press," or a simple thumbs-up.

NEW ASSIGNMENT

Ten months after his talk with Dr. Russell, it was time for him to go to a new assignment. Lt Col Jones called him up to the front of the courtroom for some remarks. "Drake, a year ago, you were a total wreck--no offense. We had two new Lieutenants in the office, and I needed a "go-to" JAG. It wasn't you. You wasted so much time trying to figure out answers without doing the work; you were always on edge, always waiting to be told to what to do and how to do it. Then, one week last October, you underwent a metamorphosis. Virtually overnight, you became invaluable. You began organizing and prioritizing your days and weeks, and you took an active interest in other people. You were the first to say "I got that" when you saw something that needed to be done, and then you followed through with

results. Before October, you had an "Average" customer service rating. After, you sustained an "Outstanding" rating from 100% of your legal assistance clients. On issues and taskers, you invested effort, actively seeking to ensure our advice and counsel was on-time and on-target. With steady discipline, you successfully tackled several courts in quick succession and were easily certified. The hours you spent seeking evidence to put clothes on that naked urinalysis drug case was inspiring. It didn't bring you any glory because it reduced a litigated court to a four-hour guilty plea, but it was a beautiful piece of lawyering. Most importantly, you invested in your peers, working their cases with them. Now, all of your teammates are either certified or nearly there… that's in large part due to you. Drake, when ADC and SVC nominations were due last September, I didn't nominate you. There was no way I was going to take that risk. But that was September. When this spot opened up, I didn't hesitate. You're absolutely ready, and you're going to be great."

Virtually overnight, you became invaluable. You began organizing and prioritizing your days and weeks, and you took an active interest in other people.

He couldn't believe he was leaving. He was going to miss this team. And he had to admit, he was even going to miss the beaches, Bar-B-Que and charm of the Deep South.

Thinking It Through:

1. Have you ever felt like Capt Williams prior to his conversation with Dr. Russell? How did you handle it? If you currently identify with that version of Capt Williams, what can you do about it?
2. After implementing Dr. Russell's advice, Capt Williams rapidly transforms his JAG Corps experience. (Author's Note: Though this story is fictional, the rapidity of Capt Williams' change and subsequent impact is based on a true story and not embellished). Part of his change was choosing to view challenging issues and problems as opportunities. How do you view issues/problems? When working a task, do you focus on doing it well or do you focus on not making a mistake? What's the problem with mistake avoidance?
3. As every person views the world subjectively, so this story is exclusively Capt Williams' perspective. The other characters are purposely generic and vague. The ability to empathize, however, is critical to leadership. Take a moment to imagine you are Capt Williams' SJA, DSJA, LOS or fellow Captain. What could you do to ensure Capt Williams is and feels like a valued member of the team?
4. Dr. Russell provides Capt Williams with some hard-hitting feedback, helping him realize he always has a choice in response to a situation. Who is your mentor? Is your mentor willing to give you honest feedback, or do they simply validate your perspective? Are you properly mentoring someone? If not, why not?

ABOUT THE AUTHOR

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Serves as the Staff Judge Advocate, 20th Fighter Wing, Shaw Air Force Base, South Carolina. He holds a Bachelors of Arts degree in Political Science from Messiah College; a Juris Doctor from The Pennsylvania State University, Dickinson School of Law; and an Masters of Law in International and Operational Law from The Army Judge Advocate General's Legal Center and School. He is a member of the Pennsylvania Bar. The author credits the several JAG Corps leaders and peers who have invested in him and mentored him through the years.

EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **TEDGlobal 2013, Kelly McGonigal:** How to Make Stress Your Friend
- **TEDx 2011, Shawn Achor:** The Happy Secret to Better Work
- **YouTube Video: Simon Sinek** – Change Your Future

RESOURCES:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

The concepts and leadership principles in this short story can be found in the following two resources, which the author highly recommends.

The first is ***The 7 Habits of Highly Effective People: Powerful Lessons in Personal Change***, by Dr. Stephen R. Covey (Simon & Schuster, 1989). Admittedly, the author avoided this classic book for years, always weary of "self-help, do this and you'll succeed" tips. He only read it after consuming his second recommendation below and was pleased to discover Dr. Covey's seven habits are not clever, previously "unknown" secrets to success. Rather, the book synthesizes timeless values and principles in an easy to understand and apply format. It is great for discussions and valuable for any member of a legal office.

- **YouTube Video:** *The 7 Habits of Highly Effective People* by Stephen R. Covey; Animated Book Summary

The author's second recommendation is ***Turn the Ship Around: A True Story of Turning Followers into Leaders***, by L. David Marquet (Penguin, 2013). This book is written by a former U.S. Navy submarine commander, who turned one of the worst crews in the Navy into one of the best in a short period of time. It presents a leadership philosophy highly adaptable to a JAG Corps legal office and offers "mechanisms" to implement it (simply substitute nautical terms with legalese). The author's copy is highlighted and earmarked; he recommends it for all, but especially for SJAs.

- **Talks at Google:** L. David Marquet: "Turn the Ship Around"